UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

CROZER CHESTER MEDICAL CENTER	:	
and	:	**CASES 04-CA-130177** **04-CA-136558 and** **04-CA-138359**
PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS	:	

EMPLOYER'S BRIEF TO THE HEARING OFFICER

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I. Statement of the Case

On November 26, 2014, the National Labor Relations Board (the "Board") issued a Consolidated Complaint and Notice of Hearing ("Complaint") for NLRB Case Numbers 04-CA-130177, 04-CA-136558, and 04-CA-138359. In the Complaint, the Board alleged Respondent violated Section 8(a)(1) of the National Labor Relations Act (the "Act")[1] by: (1) informing off-duty employees that they could not engage in picketing and/or demonstrations in support of the Union in outside non-working areas of Respondent's property on June 3, 2014; (2) prohibiting and interfering with an off-duty employee who was engaging in leafleting in support of the Union in an outside non-working area of Respondent's property on June 3, 2014; (3) prohibiting and interfering with an off-duty employee who was distributing leaflets in support of the Union and threatening the employee with unspecified reprisals if the employee continued to wear a sign supporting the Union in Respondent's lobby on September 3, 2014; (4) informing paramedics employed by Respondent they could not show support for striking employees and creating the impression Union activities were under surveillance on September 21, 2014; and (5) maintaining a rule prohibiting solicitation of patients or visitors on Respondent's property. The Board further alleged in the Complainant that Respondent violated Sections 8(a)(5) and (1) of the Act[2] by failing or refusing to furnish the Union with requested information regarding: (1) copies of Joint Commission surveys; (2) non-public documents and correspondence from JCAHO and any recommendations or deficiencies identified in unannounced surveys; and (3) contracts and other information regarding Respondent's use of temporary staffing agencies.

[1] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.
[2] Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), prohibits an employer from refusing to collectively bargain with the representative of its employees.

On December 10, 2014, Respondent timely filed its Answer denying it has committed any unfair labor practice and raising certain affirmative defenses.

A hearing was held on February 4 and 5, 2015, before Chief Administrative Law Judge Robert A. Giannasi in Philadelphia, Pennsylvania (the "Hearing"). On March 23, 2015, ALJ Giannasi set May 1, 2015 as the deadline for the parties to submit their post-hearing briefs.

II. Allegation #1: Respondent Did Not Interfere With Or Restrain Employees In The Exercise Of Their Section 7 Rights On June 3, 2014 By Informing Employees That They Could Not Picket In Outside Non-Working Area Of Respondent's Property

A. Statement of Facts

1. The Hospital's Property

Crozer Chester Medical Center (the "Hospital," "Crozer," or the "Medical Center") is a 424-bed not-for-profit tertiary-care acute-care teaching hospital located on a 68 acre campus in Upland, Pennsylvania. (Jt. Exh. 1, ¶1).[3] The Hospital's campus is located on Upland Avenue, a public street with two lanes for vehicle traffic and sidewalks on both sides of the street. There is a traffic light with a left turn signal on Upland Avenue at the intersection with Medical Center Boulevard. (Tr. 51-52).

Medical Center Boulevard, formerly known as Seminary Avenue, is a private road within the campus leading to various structures on the campus and which is exclusively owned, maintained and exclusively controlled by the Hospital. (Jt. Exh. 1, ¶3; Jt. Exh. 3). Medical Center Boulevard is a two lane road that terminates at a parking area on the Hospital's campus. (Tr. 51-52, 333-334). There is a private traffic circle or drive-up in front of the main entrance to the Hospital, which is exclusively owned, maintained and controlled by the Hospital.

[3] Citations to Joint Exhibits shall be (Jt. Exh. __); General Counsel's Exhibits shall be (GC Exh. __); Respondent's Exhibits shall be (Resp. Exh. __); Citations to the transcript shall be (Tr. __).

(Jt. Exh. 1, ¶3; Jt. Exh. 3). There are sidewalks on both sides of Medical Center Boulevard and on one side of the circular driveway leading to the main entrance. (Tr. 52-54).

The Hospital's main entrance is a heavily traveled area. Patients come in and out of the main entrance on their way to and from pre-admissions testing and admissions. Ambulatory surgery patients come in and out of the main entrance because they use the elevator located next to the front lobby. Patients who are discharged use the main entrance. New mothers and their babies also use the main entrance; often the car pulls up to the entrance and the baby is fitted into the car seat in the circular driveway at the main entrance. In addition, families and visitors come in and out through the main entrance. (Tr. 324-326).

2. The Patient Care Considerations

The Hospital exists to care for patients, and this involves the "provision of care both on a physical, emotional, and psychological level, creating an environment of healing." In addition to the physical care needs of patients, the Hospital tries to provide "an environment that's calm and restive, restorative, so that they can focus on healing and getting better." (Tr. 315-316). There is a concern that patients and families, who are already anxious about coming for care or being ill, would be subjected to added stress or anxiety when confronted with picketing on the Hospital's property. (Tr. 328-329).

3. The June 3 Picketing

By letter dated May 22, 2014, the Union provided notice pursuant to Section 8(g) of the Act that they would engage in informational picketing and handbilling at the Hospital on June 3, 2014 between the hours of 6:00 a.m. to 8:30 a.m., 11:00 a.m. to 1:30 p.m., and 3:30 p.m. to 5:00 p.m.. (Jt. Exh. 11).

The picketing on June 3 was coordinated and organized by the Union. The Union brought picket signs, which were approximately 28 by 36 inches. (Tr. 60, 71; GC Exh. 8). The Union gave instructions to the nurses to picket only during the time periods noticed in the letter. (Tr. 71, 127). Union staff representatives led the pickets. (Tr. 59, 104, 112).

The Union and bargaining unit nurses engaged in picketing on Upland Avenue. They carried or wore signs which read, among other things: "Staffing Cuts: Bad for Nurses, Worse for Patients"; and "Skilled Nurses at Your Bedside, Priceless!" (Tr. 57-62, 71-73; GC Exh. 8; Resp. Exh. 2-3). They also distributed leaflets. (Tr. 41-42; GC Exh. 5).

While most of the Union's activity on June 3 occurred on Upland Avenue, on two occasions the Union and bargaining unit nurses marched up Medical Center Boulevard and extended their picket line onto Hospital property. On both occasions they were met by Hospital representatives who asked them to confine the picketing to public property.

a) The First Incursion: The Union Pickets on Medical Center Boulevard and at the Hospital's Main Entrance

Shortly after the start of the first picketing session at 6:00 a.m., Union representative Paul Muller led a group of several dozen bargaining unit nurses up Medical Center Boulevard. They were carrying or wearing picket signs. Their picket line was met by Hospital representatives after they crossed Medical Center Boulevard at the second or third crosswalk. (Tr. 104-17, 339-342; GC Exh. 7).

At some point, a group of bargaining unit nurses led by Union representative Jessica Weil broke away from the group led by Union representative Paul Muller and marched to the Hospital's main entrance, where their picket line was met by the Hospital's Chief Nursing Officer, Eileen Young. (Tr. 139-143, 320-321; GC Exh. 7).

After these interactions, the Union and the bargaining unit nurses returned to Upland Avenue. (Tr. 104-17, 339-342).

b) The Second Incursion: The Union Pickets on Medical Center Boulevard

At around 7:00 a.m., Union representatives Andrew Gaffney and Bill Cruice led a group of 15-20 bargaining unit nurses up Medical Center Boulevard. They were carrying or wearing picket signs. Their picket line was met by Hospital representatives after marching 20-30 yards up Medical Center Boulevard. (Tr. 59-62).

After this interaction, the Union and the bargaining unit nurses returned to Upland Avenue, where their picket line remained for the rest of the day. (Tr. 63).

4. <u>The Proposed Settlement of the Unfair Labor Practice Charge And the September 3 Picketing</u>

By letter dated August 22, 2014, the Union provided notice pursuant to Section 8(g) that they would engage in picketing, informational leafleting, rallying and/or a news conference at the Hospital on September 3, 2014 between the hours of 6:00 a.m. to 8:30 a.m., 11:00 a.m. to 1:30 p.m., and 3:30 p.m. to 5:30 p.m. … . (Jt. Exh. 18).

The Hospital did not agree that picketing should be permitted on its property, but there was an unfair labor practice charge over the June 3 picketing, and "in the interest of trying to continue negotiations along," the Hospital had decided to settle the charge. (Tr. 343). At the time of the September 3 picketing, the Hospital thought the settlement would resolve the issue. For this reason, they allowed picketing on the property, consistent with the terms of the settlement:

> The Hospital was under the impression that it was settled and we followed what we had agreed to, that we would allow non-working personnel, during non-work time, on the hospital property.

(Tr. 345).

However, the Union did not agree with the settlement and, ultimately, there was no settlement. (Tr. 345).

5. Credibility Determinations

The essential facts surrounding the picketing events on June 3 are not in dispute. In both cases, Hospital representatives advised the Union that their picketing should be limited to public areas such as Upland Avenue. However, some of the specific facts are in dispute. For the reasons set forth below, the testimony of the Hospital's witnesses should be credited over the testimony of the General Counsel's witnesses.

a) The Testimony of Union Representative Paul Muller Should not be Credited

Union representative Paul Muller testified that, after crossing Medical Center Boulevard, he was "met at that sidewalk on the other side of Medical Center Boulevard by Liz Bilotta; the DON, Eileen; and a handful, maybe four or five gentlemen in suits. They stopped me and Liz Bilotta spoke, and she said you can't be here and you have to get off the property. She explained that her -- she said our engineers have assured us that Medical Center Boulevard is our property and you have to leave." (Tr. 104-107).

Asked if it was possible that he was met by Liz Bilotta, Eileen Young and one other individual, Brian Pfister, Mr. Muller said only that: "I felt like I was sort of surrounded by people in suits, so I want to say it felt like four or five individuals." (Tr. 112-113). Mr. Muller denied that Liz Bilotta said anything about the nurses picketing at the main entrance during their interaction. (Tr. 114-115). Nonetheless, he testified that he called Union representative Jessica Weil, who was leading the pickets at the main entrance, and instructed her to move to Upland Avenue. (Tr. 106).

b) The Testimony of Union Representative Andrew Gaffney Should not be Credited

Union representative Andrew Gaffney testified that, after marching up Medical Center Boulevard with Bill Cruice and a group of pickets, they were met by Liz Bilotta and Eileen Young: "They informed us that we had to leave, that we couldn't be there, that they were on hospital property, that their engineers had assured them that this was a private street, not a public street, and that we all had to leave. … Bill informed or said to Ms. Bilotta and Ms. Young that they could ask the staff to leave the property, because we didn't work there, but nurses had a right to picket on the sidewalk. We were again told to leave, so we left." (Tr. 62-63).

c) The Testimony of Bargaining Unit Nurses Leslie Elaine Heygood and Janet Dwyer Should not be Credited

Bargaining unit nurse Leslie Elaine Heygood testified that she was with the group of nurses, led by Union representative Jessica Weil, that picketed at the main entrance. She testified that they were met by Eileen Young: "We start heading towards the circular driveway. We go around. And as I got to maybe I think like the second column, I ran into Eileen Young. She was coming towards us. She said something, because I was towards the middle of the group, and she said something to people in the beginning of the group. Then when she got to me, I said good morning, Eileen, and she said this is private property, you have to leave, you can't be here." (Tr. 140-141).

Bargaining unit nurse Janet Dwyer also testified that she was with the group of nurses, led by Union representative Jessica Weil, that picketed at the main entrance. She testified that they were met by Eileen Young: "And right before we got maybe a little bit before the entrance to Crozer, Crozer's main lobby, Eileen Young approached us and told us we couldn't be there and that we had to leave." "Jessica Weil, who was standing next to me, asked

her, she said are you telling us we have to leave the property. And Eileen Young responded, yes, you have to leave." (Tr. 154).

d) The Testimony of Liz Bilotta and Eileen Young Should be Credited

Vice President of Human Resources Liz Bilotta and Chief Nursing Officer Eileen Young testified credibly and consistently that when they met Union representative Paul Muller, the only other person present from the Hospital was Brian Pfister, a Director in Operations. (Tr. 317, 340).

Mr. Muller's recollection of who was present was unclear. After noting that he felt like he was surrounded, Mr. Muller added: "so I want to say it felt like four or five individuals." (Tr. 112-113). By contrast, Ms. Bilotta and Ms. Young had a clear and specific recollection of who was with them when they went out to meet the Union and stop their march onto the property. (Tr. 317, 340). Regardless of how he felt, Mr. Muller was not surrounded by men in suits.

Ms. Bilotta and Ms. Young also testified credibly and consistently that they delivered a very specific message to the Union and the pickets: that they respected the Union's right to picket, but they were asking the pickets to leave the property and conduct their picketing on public property on Upland Avenue. (Tr. 319, 340-342).

Eileen Young testified credibly that she delivered the same very specific message to the Union and the pickets that she encountered at the main entrance: that she respected the Union's right to picket, but they were asking the pickets to leave the property and conduct their picketing on public property on Upland Avenue. (Tr. 320-321).

This specific message was very important to the Hospital, because it represented their legal position. The recollections of the General Counsel's witnesses are understandably

focused on the direction they were given – to leave the property. The recollections of the Hospital's witnesses are more complete and accurate because the specifics of the message – the actual words that were used – were more important to the Hospital than to the picketers. For these reasons, the testimony of Vice President of Human Resources Liz Bilotta and Chief Nursing Officer Eileen Young should be credited over the Union representatives and bargaining unit nurses who testified about the June 3 picketing.

B. Argument: The Hospital Lawfully Barred Picketing on Hospital Property

The Board applies a balancing test in cases involving access to private property by off-duty employees. Among other things, the Board considers the degree of impairment of the Section 7 right if access should be denied, against the degree of impairment of the private property right if access should be granted.

In this case, the degree of impairment of the Section 7 right is minimal if access should be denied, while the degree of impairment of the private property right is significant if access should be granted. This is because the Hospital's property rights are substantial, because – among other things – they relate to their interest in protecting patients from activities that could affect their care, while the Union has the ability to picket on public property adjacent to the only roads and driveways leading onto Hospital property, and can thereby convey its message to everyone entering Hospital property and can do so from the safety of public sidewalks.

1. The Balancing Test Set Forth by the Board in *Jean Country* is Applicable Here

In Jean Country, the Board reviewed relevant cases involving the exercise of Section 7 activity on private property and clarified the Board's approach in these cases. Jean Country, 292 NLRB 11 (1988). Each of the reviewed cases, spanning over 30 years of NLRB

and Supreme Court precedents, required the Board to balance Section 7 rights with property rights.

In NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), the Court addressed the employer's refusal to allow nonemployee union organizers access to its private parking lot, and held that the Board must seek to accommodate Section 7 rights and property rights. The Court announced a test, noting that: "[a]ccommodation between the two must come with as little destruction of one as is consistent with the maintenance of the other." Id. at 112.

In Scott Hudgens v. NLRB, 424 U.S. 507 (1976), the Court addressed a mall owner's refusal to allow employees to picket in an enclosed shopping mall in front of its employer's retail stores. The Court re-affirmed the accommodation principle: "[u]nder the Act, the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, 'and to seek a proper accommodation between the two.'" Id. at 522.

> The Babcock & Wilcox opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights 'with as little destruction of one as is consistent with the maintenance of the other.' … ***The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context.***
>
> Id. (emphasis added).

On remand, the NLRB heeded the words of the Supreme Court and quoted the bolded language above in trying to balance the Section 7 rights of the picketing employees vs. the property rights of the mall. Scott Hudgens, 230 NLRB 414, 415 (1977). As the Court did, the Board recognized the difference between picketing employees and handbilling non-employees in Babcock & Wilcox. Id. at 416. However, since the directed target of the picketing was one of 60 stores in the mall and theclosest public area was 500 feet from the store, any

message "at such a distance from the focal point would be too greatly diluted to be meaningful." Id. at 417. Ultimately, after balancing the parties' rights, the Board concluded that the "property right to exclude certain types of activity on his Mall must yield to the Section 7 right of lawful primary picketing directed against an employer doing business on that Mall." Id. at 417.

In third case reviewed, Fairmont Hotel, 282 NLRB 139 (1986), the Board had announced another balancing test "under which the strength of the claim of Section 7 rights would be balanced against the strength of the property rights involved, with the stronger right prevailing." Id. at 148. In Jean Country, the Board opined that it had "become apparent that individual Board members differed over interpretation and application of the Fairmont test…and on reexamination of the two principal Supreme Court cases [Babcock & Wilcox and Scott Hudgens] that must guide our decisions on this issue, we believe that further clarifications of the Board's approach in access cases is necessary." 291 NLRB at 11. The Board overruled Fairmont Hotel, 282 NLRB 139 (1986), because the Board determined that "the availability of reasonable alternative means must be considered in every access case." Id. The modified three-factor balancing test created by Jean Country required the Board to consider:

> 1) the degree of impairment of the Section 7 right if access should be denied, as it balances against 2) the degree of impairment of the private property right if access should be granted. We view the consideration of 3) the availability of reasonably effective alternative means as especially significant in this balancing process.
>
> 291 NLRB at 14.

a) The Supreme Court's Decision in *Lechmere* did not Overrule the *Jean Country* Test as Applied to Employees

In Lechmere v. NLRB, 502 U.S. 527 (1992), the Court addressed the employer's ejection of nonemployee union organizers who placed handbills on the windshields of cars in the parking lot during an organizing campaign. The Board had applied the Jean Country balancing

test to this case involving nonemployees. The Court disagreed and explained that its decision in Babcock & Wilcox held that the Act distinguished between the union activities of employees and nonemployees. The Court then endorsed the Board's balancing test as applied to employee activities (as in Jean Country) but not as applied to nonemployee activities:

> In cases involving *employee* activities, we noted with approval, the Board 'balanced the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of his property.' In cases involving nonemployee activities (like those at issue in Babcock itself), however, the Board was not permitted to engage in that same balancing (and we reversed the Board for having done so)."
>
> Lechmere, 502 U.S. at 537.

The Court specifically limited its holding to nonemployees:

> At least as applied to nonemployees, Jean Country impermissibly conflates these two stages of the inquiry- thereby significantly eroding Babcock's general rule that 'an employer may validly post his property against nonemployee distribution of union literature,' 351 U. S., at 112. We reaffirm that general rule today, and reject the Board's attempt to recast it as a multifactor balancing test.
>
> Lechmere, 502 U.S. at 538.

Thus, the Lechmere Court explicitly dealt with "nonemployee union organizers" and only overruled Jean Country to the extent it applies to nonemployees.

2. Even if *Jean Country* is not the Applicable Standard, the Board Will Balance Section 7 Rights and Property Rights

Jean Country sought to harmonize the Babcock & Wilcox test for nonemployees with the Scott Hudgens test for employees. The Supreme Court disapproved because there is no balancing test for nonemployees. Even if Lechmere overruled or distinguished Jean Country as it would apply to employees, the Supreme Court and Board precedent of Scott Hudgens

remains.[4] Scott Hudgens involved employee picketing on private property. That the property in question was not owned by the employees' employer was a factor in the balancing test. If the private property on which the picketing took place had been owned by the employer, the case may well have been decided differently because "the locus of the accommodation may fall at differing points along the spectrum depending on the nature and strength of the respective rights." Scott Hudgens, 230 NLRB at 415. In such a case, however, there would still be a balancing test. See Quietflex Manufacturing Co., 344 NLRB1055, 1058-159 (2005)(Board using balancing tests of Babcock & Wilcox and Scott Hudgens to balance Section 7 rights of employees to engage in a work stoppage vs. the employer's property right).

3. *Republic Aviation* Is Inapplicable Because It Did Not Address Picketing

The Court in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), addressed a factory employer that adopted a rule prohibiting "soliciting of any type in the factory or offices." The Court held that employers may not bar employees who are not on working time from: (1) engaging in solicitation, or (2) distributing literature in nonworking areas of its property, unless such a bar is necessary to maintain discipline and production.

Republic Aviation was a solicitation/distribution case. It did not deal with picketing. There appears to be only one case in which the Board applied the Republic Aviation

[4] Whether Lechmere affected Jean Country as to employees is an interesting issue. It seems clear on its face that Lechmere only affects the balancing test as it relates to nonemployees. As recently as 2011, the General Counsel argued that the Jean Country standard should apply. See N.Y. N.Y. Hotel and Casino, 356 NLRB No. 119 at slip. op. 14 (2011)("General Counsel proposes a standard requiring the Board to examine whether the employee has reasonable alternative means to inform consumers about their labor dispute, under the standard not of Lechmere, but rather the Board's decision in Jean Country"). While the Board disagreed about the standard to be used, its footnote regarding Jean Country indicated that it could still be applied to employees. Id. at fn. 17("In Lechmere, the Supreme Court expressly rejected the Jean Country standard, at least as applied to nonemployee union organizers). At least one ALJ, post-Lechmere, used the balancing test announced in Jean Country to find that an employer's property right outweighed the Section 7 rights of employees to picket on its property. See Fuji Foods US, Inc., 27-CA-17596, 2002 NLRB LEXIS 313 (2002).

Regardless of the status of Jean Country, there can be no doubt that Scott Hudgens was undisturbed by Lechmere.

standard to conduct that included picketing, but it is distinguishable from the instant case for several reasons. Town & Country Supermarkets, 340 NLRB 1410 (2004).

First, the employer in Town & Country specifically prohibited employees from handbilling as well as picketing. Id. at 1432. Having found that the employer impermissibly restricted handbilling, which is specifically governed by Republic Aviation, the Board did not conduct any separate analysis or evaluation to determine whether the employer's property interests were sufficient to allow it to specifically restrict picketing. In the instant case, the Hospital did not prohibit handbilling on the property.

Second, the ALJ in Town & Country found that the prohibition of handbilling violated Section 8(a)(1) because the employer discriminated against employees by prohibiting their messages, but allowing other business, civic and charitable organizations to solicit in the same locations. Here, there is no evidence or allegation that the Hospital allowed other organizations to picket, solicit, or distribute on its property. Finally, the Board in Town & Country improperly relied on a case that did not involve picketing (i.e., Gayfers Department Store, 324 NLRB 1246 (1997)) to find that Republic Aviation applied to employee picketing.[5]

a) Picketing is Fundamentally Different from Other Section 7 Activity

"Picketing is qualitatively 'different from other modes of communication.'" Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) (internal citations and quotations omitted). "Regardless of the purpose or intent of the activity, all picketing differs substantially from handbilling." District 1199 (United Hospitals of Newark), 232 NLRB 443, 443 (1977). "Picketing is differentiated from handbilling or other

[5] As discussed in Section III, B, 2, d, infra, Town & Country also involved activity near the employer's store within a shopping center. The Supreme Court and Board made clear in Scott Hudgens that forcing employees to picket on public property outside of a shopping center or mall and away from the intended target of the picketing would too greatly dilute the picketers' message. Hudgens, 230 NLRB 414, 417 (1977).

forms of mere persuasion . . . . picketing is defined not by the mere presence of individuals, but by conduct that results in coercive confrontation." Laborers Eastern Region Organizing Fund (Ranches at Mt. Sinai), 346 NLRB 1251, 1253 fn. 5 (2006). "Picketing differs qualitatively from other forms of communication, . . . handbilling is a technique depending entirely on the persuasive force of an idea."). Plumbers Local 32 (Ramada), 307 NLRB 473, 476 (1992) citing NLRB v. Drivers, 362 U.S. 274 (1960). "Picketing is a mixture of conduct and communication. In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business or establishment." Sheet Metal Workers International Association, Local 15, 346 NLRB 199, 200 (2006)(Liebman concurring) citing NLRB v. Retail Store Employees Union, Local 101 (Safeco), 447 U.S. 607 (1980).

To the extent that the General Counsel argues that picketing is akin to other forms of Section 7 activity, his argument must fail. Board and Supreme Court precedent are clear that picketing cannot be equated with solicitation or handbilling. Obviously, Congress distinguished between picketing and other forms of Section 7 activity at a hospital when it chose not to require a 10-day notice period when healthcare employees seek to solicit or handbill. In cases involving Section 8(g), the Board has made clear that "the potential disruption inherent in any act of picketing…irrespective of the picketers' intent or self-regulation, is such that no act of picketing can be treated as the functional equivalent of handbilling." District 1199 (United Hospitals of Newark), 232 NLRB at 443.

If the General Counsel argues that Republic Aviation should apply, he is treating picketing as the functional equivalent of solicitation and distribution. Such a theory would

ignore the obvious and well-established distinctions between solicitation/distribution and picketing.[6]

To the extent the General Counsel cites Capital Medical Center, JD(SF)-35-14, Case 19-CA-105724 (July 17, 2014), that decision is not precedential and was wrongly decided. ALJ Laws ignored the fundamental differences between picketing and handbilling. While recognizing that Section 8(g) imposes different constraints on picketing as opposed to handbilling, she dismisses them - with no authority - because there was no work stoppage accompanying the picketing. Id. at slip. op. 12. If a work stoppage were required to distinguish picketing from handbilling at a hospital, Section 8(g) would so state. The ALJ also refers to Providence Hospital as an "outlier in the wake of the caselaw that has since developed concerning off-duty employees who engage in Section 7 activity in nonworking areas of their own employer's property." Id. at slip. op. 11. While the ALJ is correct that Providence Hospital, 285 NLRB 320 (1987), relied upon the balancing test announced in Fairmont Hotel, which was overruled by Jean Country, she does not cite to a single case to support the idea that Providence Hospital is an outlier.[7] The ALJ did not point to a single decision in which the Board found that it was unlawful for the employer to require picketers to picket on public property bordering its own property (such as the sidewalk on Upland Avenue in the instant case). The outlier here is Capital Medical Center.

[6] While arguably dicta, the ALJ's decision in Cone Mills Corporation is instructive on the pre-Scott Hudgens, Jean Country, Lechmere view of Republic Aviation. 174 NLRB 1015, 1019 (1969)(ALJ stating that employer has "undoubted right to exclude, from its plant and appurtenant private property, picket lines and pickets (both employees and non-employees, with the much narrower limitation it may impose on the right of its employees (as opposed to nonemployees) to communicate with each other on self-organizational matters by distribution of literature in the non-working areas of the plant.")

[7] While the balancing test in Fairmont Hotel is different from Scott Hudgens and Jean Country, it is doubtful that Providence Hospital would have been decided differently under either of those standards. In Providence Hospital, the picketers stood at the entrance to the only road in and out of the hospital and, in such a case, could reach "99 percent of the public using the Respondent's hospital." 285 NLRB 320, 321 (1987)

4. Requiring Picketing on Public Property Protects the Hospital's Strong Property Rights with Minimal Impairment of the Section 7 Right

This case involves a conflict between Section 7 rights and property rights. As required by Supreme Court and Board precedent, the Board must seek a proper accommodation between the two. As the Court noted in Lechmere, it approved the Board's balancing of "the conflicting interests of employees to receive information on self-organization on the company's property from fellow employees during nonworking time, with the employer's right to control the use of his property." Lechmere, 502 U.S. at 537. The balancing of those interests in this case supports a finding that the Hospital lawfully barred picketers from picketing on its property.

a) The Hospital's Property Rights Are Strong and Undisputed

The undisputed facts demonstrate that Medical Center Boulevard, formerly known as Seminary Avenue, is a private road within the campus leading to various structures on the campus and which is exclusively owned, maintained and exclusively controlled by the Hospital. (Jt. Exh. 1, ¶3; Jt. Exh. 3). The undisputed facts also demonstrate that there is a private traffic circle or drive-up in front of the main entrance to the Hospital, which is exclusively owned, maintained and controlled by the Hospital. (Jt. Exh. 1, ¶3; Jt. Exh. 3).

While the Union's attorney sought to demonstrate that the Hospital allowed public access on Medical Center Boulevard, he succeeded only in demonstrating the extent to which Hospital property is used almost exclusively by patients, families and visitors. The only other element of public access is the existence of a bus stop on Medical Center Boulevard. Beyond that, the Union's attorney elicited testimony that suggested a person could walk a dog on Medical Center Boulevard and that a driver could use Medical Center Boulevard to turn around. (Tr. 68-69).

b) The Hospital's Property Rights Are Unique Because they Involve the Additional Consideration of Patient Care

The undisputed facts demonstrate that caring for patients involves the "provision of care both on a physical, emotional, and psychological level, creating an environment of healing." In addition to the physical care needs of patients, the Hospital tries to provide "an environment that's calm and restive, restorative, so that they can focus on healing and getting better." (Tr. 315-316). The undisputed facts also demonstrate that patients and families would be subjected to added stress or anxiety when confronted with picketing on the Hospital's property. (Tr. 328-329).

The Board has held that where off-duty employees and union representatives were engaged in picketing at a hospital, the hospital had the right to require them to remain on public property. See, e.g., Providence Hospital, 285 NLRB 320 (1987). Among other things, the Board noted that "even where neither picketing nor nonemployees are involved, the significance of specialized health care concerns has been recognized to the extent of permitting greater restrictions on exclusively employee Sec. 7 solicitation and distribution within a hospital." Id. at 322, fn. 5 (citations omitted).

c) The Section 7 Right Would Suffer Minimal Impairment if Picketing Were Limited to Public Property

When considering the balancing of the parties' interests in this case, it is instructive to consider those cases in which the Board has found that the employer's property rights must yield to the Section 7 right.

The Board in Jean Country concluded that the employer's property rights must yield to the Section 7 right for the following reasons, none of which is applicable to the instant case:

(1) The quarter mile distance of the targeted store from the nearest public property entrance, combined with the sheer number of persons visiting the mall daily (10,000 – 20,000), the large number of other stores in the mall (104), and the number of different entrances to the property (8).

(2) The improbability of identifying potential customers of the store and communicating a message to them from one of the entrances. The union could identify potential customers and communicate a meaningful message to them only in a location relatively close to the store itself.

(3) The likelihood that the union would unintentionally enmesh neutral stores in its dispute with Jean Country because of the circumstances of the case.

By contrast, the picketers in our case were not a quarter mile from the employer's property; on Upland Avenue, they were at the very edge of the Hospital's property. Even if one considers the distance to the main entrance, it was not a quarter mile (440 yards), but a mere 50 yards. The picketers in our case also did not have to confront up to 20,000 daily visitors. More importantly, there was one point of entry to Hospital property (Medical Center Boulevard), and those entering the property were there to visit the Hospital; this case would be analogous to Jean Country only if there were 104 separate hospitals on the Hospital's property. Finally, and for the same reasons, the picketers in our case would not enmesh any neutral employers in the dispute by picketing on public property.

In short, the picketers in our case had the ability to picket on public property immediately adjacent to the only roads and driveways leading onto Hospital property, and could thereby communicate their message to everyone entering Hospital property and could do so from the safety of public sidewalks. Under the facts of this case, it is hard to imagine how the Section 7 right would suffer any impairment if picketers were barred from picketing on Hospital property.[8]

[8] The Board has only found a violation for moving employee picketers to public property under very different circumstances. Applying the Jean Country test, the Board found an employer movie theater could not require picketing employees to move to public property at the entrance to its property because "union activity at that

In considering the impairment of the Section 7 right, it is relevant to consider the nature of the activity. The question in this case is whether the picketers could picket on Hospital property. By its very nature, and by the public's understanding of its meaning, a picket line is its own message. A picket line is not in place to engage in measured debate or nuanced dialogue with passers-by or others. Instead, a picket line is a signal to those entering an employer's site; it lets them know that there is a labor dispute with that employer. For this reason, the requirement that picketing be limited to public property in this case would not impair the Section 7 right at all. By maintaining a picket line at the only entrance to the Hospital's property, the picketers can effectively communicate their message to all those entering or seeking to enter the Hospital. In addition, given the size of the picket signs, those driving in would have the ability to read the signs. Finally, if the picketers sought more direct or personal interaction with patients, families and visitors, they had the right to handbill on Hospital property.

d) The Cases Cited by Counsel for the General Counsel Confirm That the Balancing of Interests Requires Limiting Picketing to Public Property

During the Hearing, Counsel for the General Counsel provided his rationale for why prohibiting employees from picketing on private Hospital property was unlawful:

> It is private property, but that doesn't necessarily immunize it from employees coming on to engage in protest. Under some circumstances, employees are permitted to go onto private property, to engage in Section 7 activity. And even in some cases the Board has allowed employees to go on private property and engage in picketing in connection with contract disputes or other disputes. Our position would be that in the circumstances of this case, that you have to balance their right to engage in

---

location would be ineffective and unsafe." W.S. Butterfield Theatres, 292 NLRB 30, 33 (1988). There was no traffic signal near the entrance to the theater and bushes near the public property would "make it difficult for patrons turning into parking lot to read the picket signs." Id. The Board found that the employees' "Section 7 right 'would be severely impaired- substantially destroyed…without entry onto the theater property").

None of those factors is present here. There is a traffic signal at the entrance to the driveway to Medical Center Boulevard and a lane for a left hand turn. (Tr. 51). There was no testimony that signs would be obscured in anyway on the sidewalk on Upland Avenue.

> Section 7 activity with the hospital's right to exclude them from the property.
>
> (Tr. 64).

Counsel cited the following Board cases: Scott Hudgens, supra, Holland Rantos Co., 234 NLRB 726 (1978), Town & Country Supermarkets, supra, and Mooresville IGA Foodliner, 284 NLRB 1055 (1987). (Tr. 64). These cases do not support his theory.

Scott Hudgens, Holland Rantos, and Town & Country Supermarkets involve the actions of businesses within a shopping mall, industrial park, and shopping center, respectively. Those cases stand for the proposition that employees of a business located within a larger corporate space with multiple other businesses cannot be forced to picket on public property far removed from the employer they are targeting. Further, in Town & Country, the employer prohibited both picketing and employee handbilling from the area in front of the store. With the prohibition on handbilling clearly unlawful, neither the ALJ nor the Board engaged in a separate analysis of the distinction between picketing and handbilling. Here, there is no dispute that Crozer only prohibited picketing on its property on June 3.

In Mooresville IGA Foodliner, the employer operated four grocery stores. Employees picketed outside two of these stores. One store shared a parking lot and common vestibule area with another store. Id. at 1077-78. The second store was "the only facility occupying a tract of land all of which was owned by Respondent [the employer]." Id. at 1078. Employees picketed directly in front of both store locations. Consistent with Hudgens, the Board found the employer could not prohibit employees from picketing on the walkway leading directly to its location from the parking lot shared by another employer. Id. at 1057.

With respect to the other store not on shared property, the Board recognized that "'a single store surrounded by its own parking lot provided exclusively for the convenience of

customers will have a significantly more compelling property claim' than 'the owner of a large shopping mall who allows the general public to utilize his property without substantial limitation.'" Id. Nonetheless, under circumstances in that case, the Board found that requiring employees to picket on the sidewalk across the street in "an area far removed from the store entrance" violated the Act. Mooresville IGA Foodliner, 284 NLRB at 1057, 1078.

Of the four cases cited by the General Counsel, only the prohibition of picketers from the parking lot of the second retail Mooresville store is remotely relevant to the case at bar. Nurses at Crozer were not required to picket across the street from the employer's entrance and "removed from the traffic pattern so necessary both to effective handbilling and to the opportunity for personal identification" as the employees at the second Mooresville's store. Id. at 1078. Rather, the picketers in our case had the ability to picket on public property on the same side of the street as the Hospital property and at the only roads and driveways leading onto Hospital property. (Tr. 60-61; GC Exh. 8).

Less than a month after Mooresville, the Board issued Providence Hospital, in which it considered whether a hospital could prevent picketing on its property. Using the same analysis and citing the same case law as it did in Mooresville, the Board concluded that the "property right asserted by the Respondent in its hospital and surrounding grounds, which it does not share with any other enterprise, is at least as strong as that of…a single retail store surrounded by its own parking lot." Id. at 322. The Board then cited prior recognition that "[e]ven where neither picketing nor nonemployees are involved, the significance of specialized health care concerns has been recognized to the extent of permitting greater restrictions on exclusively employee Section 7 solicitation and distribution within a hospital." Id. at fn. 5 (citations omitted). The Board held that the hospital did not violate the Act because "picketing

on public property adjacent to the main driveway entrance…enables the Union to convey its protests to 99 percent of the public using the Respondent's hospital." Id. at 322. Both in terms of the location of the picketers and its status of a healthcare employer, Providence Hospital is much more relevant to the facts here and distinguishes the earlier-decided Mooresville IGA to the point of irrelevance. Simply put, the General Counsel cannot rely upon the four cases cited during the Hearing to establish a violation of the Act.

5. The Picketing on Hospital Property on September 3 has no Bearing on the Analysis

The undisputed facts are that, at the time of the September 3 picketing, the Hospital was proceeding with a settlement of the unfair labor practice charge relating to the June 3 picketing. For that reason, the Hospital allowed picketing on the property, consistent with the terms of the proposed settlement. (Tr. 345).

The mere fact that the picketing on September 3 did not result in known problems with blocking ingress or egress, or interference with patient care or hospital operations, has no bearing on the analysis of whether the Hospital lawfully barred picketing on its property on June 3. The balancing required by Supreme Court and Board precedent does not require a showing that the Section 7 activity in question would necessarily lead to interference with patient care or hospital operations.

Moreover, as discussed in Section III, B, 3, a, supra, the Board has repeatedly held that even the possibility of an interference with or disruption to patient care is of great concern. For these reasons, the mere fact that the Union picketed on Hospital property on September 3 without any known interference with patient care or hospital operations has no bearing on the analysis of the Hospital's right to bar picketing on its property on June 3.

III. Allegation #2: Respondent did not Prohibit or Interfere with Employee Leafleting on June 3, 2014

A. Statement of Facts

The Hospital has always allowed bargaining unit nurses to engage in handbilling on Hospital property while off-duty. (Tr. 251-252). The Hospital also has allowed Union representatives to handbill on Hospital property. (Tr. 228). However, the protocol is for the representative to provide advance notice to the Hospital if they are going to be on the property. (Tr. 84-87). As Union representative Muller noted: "[p]ursuant to the contract, we need to give notice that we're going to be on the property as staff reps." (Tr. 124). However, he did not provide any such notice on June 3. (Tr. 124).

Around midday on June 3, Union representative Paul Muller asked bargaining unit nurse Teresa Devlin if she would go with him "to the front door and leaflet." Ms. Devlin removed her picket sign, and she and Mr. Muller walked towards the Hospital's main entrance with stacks of leaflets. (Tr. 107-108, 134; GC Exh. 5). As they approached the main entrance, they were approached by Ryan Clarke, who was employed as a Security Manager at the Hospital on June 3. (Tr. 108, 130, 294; GC Exh. 7).

Security Manager Clarke approached Mr. Muller and Ms. Devlin because it was his understanding that the activities of the day were supposed to be limited to public property such as Upland Avenue. However, he also understood that the activities of the day consisted of picketing. (Tr. 309). Security Manager Clarke understood that if activities extended beyond the corner of Upland Avenue, that he was to seek guidance from Hospital Administration. (Tr. 303-304).

After their interaction with Security Manager Clarke, Mr. Muller and Ms. Devlin returned to Upland Avenue and did not engage in leafleting at the Hospital entrance. (Tr. 298).

Mr. Clarke reported the incident to Hospital Administration, and he was advised that the leafleting activity was permissible. (Tr. 307-308). Mr. Clarke is no longer employed by the Hospital; he is now the Director of Security for a different health system. (Tr. 301).

1. Credibility Determinations

It is undisputed that Union representative Paul Muller and bargaining unit nurse Teresa Devlin approached the Hospital's main entrance on June 3, that they were met by Security Manager Clarke before they reached the main entrance, and that after their interaction with Security Manager Clarke they returned to Upland Avenue and did not engage in leafleting at the Hospital entrance. However, the details of the interaction are disputed. For the reasons set forth below, the testimony of Security Manager Clarke should be credited over the testimony of Mr. Muller and Ms. Devlin.

a) The Testimony of Former Security Manager Ryan Clarke Should be Credited

(1) Mr. Clarke is no Longer Employed by the Hospital

Former Security Manager Clarke is no longer employed by the Hospital. He now lives in Reno, Nevada and works for another employer. (Tr. 294, 301). Mr. Clarke has no connection to the Hospital or to this case, and has no motive to prevaricate or misrepresent the facts.

(2) Mr. Clarke had a Specific Recollection of his Instructions on June 3 and His Conduct was Consistent with Those Instructions

Former Security Manager Clarke testified about the instructions provided to security regarding engagement with the picketers on June 3. They were instructed to engage or interact "[o]nly insofar as to determine what their actions were, not to stop anything but to

understand what they were doing, if they were leaving the corner of Upland Avenue and Medical Center Boulevard." (Tr. 295).

Mr. Clarke testified that he approached Mr. Muller and Ms. Devlin because they were breaking away from the area where he thought they were supposed to be, at the corner of Upland Avenue and Medical Center Boulevard. It was his understanding that "anything outside of that area was to get reported through administration for guidance." (Tr. 303-304). He testified that he approached them to understand what they were doing and seek guidance, as instructed:

> Okay. So I encountered them there to inquire as to what they were doing, where they were headed. They advised that they were going to handout brochures at the main lobby. And I just advised them that I needed to check with administration. At that point, they said, oh, that's okay, we'll go back. And I'm like are you sure, I'm going to check with administration and then you can continue. And they're like, no, we're going to go back to the corner. That was the union rep talking. At that point, they departed and I just reported that through administration at the time.
>
> (Tr. 296-297).

(3) Mr. Clarke Presented as a Security Professional and his Description of the Interaction was Consistent with his Manner

Mr. Clarke presented as a security professional and he testified candidly and thoughtfully. Though he is obviously a young man, he is now the Director of Security for another health system. His testimony that he reported the incident to Hospital Administration, even though Mr. Muller and Ms. Devlin had left, only served to underscore his professionalism. (Tr. 307-308). His description of the interaction was perfectly consistent with his demeanor and his presentation as a witness. His testimony about the instructions he received was unrebutted and unchallenged, and only his description of the interaction is consistent with those instructions.

b) The Testimony of Union Representative Paul Muller and Bargaining Unit Nurse Teresa Devlin Should not be Credited

The testimony of Mr. Muller and Mr. Devlin described a person with a very different demeanor and approach. In Mr. Muller's telling, Mr. Clarke intercepted them and said, "you guys can't be here, everybody has to be off the property." (Tr. 108-109; GC 5). Similarly, in Ms. Devlin's telling, Mr. Clarke said: "You're not allowed to informational picket up here; you're going to have to go back up to Upland Avenue." (Tr. 133-137). This description of the events simply does not square with Mr. Clarke's demeanor and presentation as a witness and as a security professional who acted in accordance with his instructions.

B. Argument: Ryan Clarke Did Not Interfere With Employees' Right to Handbill

1. The Hospital Did Not Prohibit or Interfere with Teresa Devlin Leafleting in an Outside Non-Work Area

For the reasons described above, the Judge should credit the testimony of former Security Manager Clarke and should not credit the testimony of Mr. Muller or Ms. Devlin. Based upon the description given by Mr. Clarke, he merely advised that he needed to check with Hospital Administration, and he attempted to get them to wait for him to do that. As he said: "[A]re you sure, I'm going to check with administration and then you can continue." (Tr. 296).

2. The Hospital Had the Right to Approach Mr. Muller Based Upon the Protocols for Union Representative Coming on Site

Counsel for the General Counsel stated that he is not alleging that the Hospital's actions with regard to Mr. Muller were unlawful; only the Hospital's actions with regard to Ms. Devlin are alleged to be unlawful. (Tr. 125). But the General Counsel's position misses the point; Mr. Muller was with Ms. Devlin. It is undisputed that when a Union representative comes on site to leaflet, even when he is going to be with bargaining unit nurses, the representative is to

provide notice to the Hospital. (Tr. 84-87, 124). It is similarly undisputed that Mr. Muller failed to provide this notice on June 3. (Tr. 124).

IV. Allegation #3: Respondent did not Interfere with or Restrain Employees in the Exercise of their Section 7 Rights on September 3, 2014 by Informing Employees that they Could Not Picket Inside the Respondent's Facility

A. Statement of Facts

1. The September 3 Picketing

By letter dated August 22, 2014, the Union provided notice pursuant to Section 8(g) that they would engage in picketing, informational leafleting, rallying and/or a news conference at the Hospital on September 3, 2014 between the hours of 6:00 a.m. to 8:30 a.m., 11:00 a.m. to 1:30 p.m., and 3:30 p.m. to 5:30 p.m. … . (Jt. Exh. 18). The Union and bargaining unit nurses were engaged in picketing during the times listed in the notice. At the end of each of the sessions, the picketing stopped and they left the property. (Tr. 241-242; 249).

2. The September 3 Picketing / Activity Inside the Hospital

In addition to picketing outside the Hospital, the Union and bargaining unit nurses walked into the Hospital while wearing picket signs during each of the noticed picketing sessions. As with the picketing outside, at the end of each of the sessions, they left the property. Hospital representatives had several interactions with Union representatives and bargaining unit nurses who walked into the Hospital while wearing picket signs during each of the sessions. (Tr. 241-242).

However, it was not until a management meeting on the afternoon of September 3 that the Hospital learned the extent of the actions of the Union and bargaining unit nurses inside the Hospital on that day. The nature and extent of Union activity in the Hospital provided the background and context for the Hospital's Director of Human Resources, Tony

DiBartolo, to approach bargaining unit nurse Carol McNasby and Union organizer Janna Frieman and tell them that they could not remain in the lobby while wearing picket signs, but if they removed the signs they could remain in the lobby "and handbill all you want." (Tr. 241-244).

The activity inside the Hospital on September 3 was coordinated and organized by the Union. Union organizer Janna Frieman testified that "there was a plan to leaflet inside the hospital" and that one of her assignments was "to bring nurses inside the hospital and leaflet." (Tr. 167). Bargaining unit nurse Carol McNasby testified that she went outside to picket at the end of her shift at around 3:00 p.m. on September 3 and, a few minutes later, Union organizer Janna Frieman told her that "we were going to hand out leaflets in the lobby." (Tr. 182-183).

3. Credibility Determinations

It is undisputed that Director of Human Resources Tony DiBartolo told bargaining unit nurse Carol McNasby and Union organizer Janna Frieman that they could not remain in the Hospital lobby while wearing picket signs. However, the details surrounding the actions of Ms. McNasby and Ms. Frieman in the lobby are disputed. For the reasons set forth below, the testimony of Director of Human Resources DiBartolo should be credited over the testimony of Union organizer Janna Frieman.

a) The Testimony of Union Organizer Janna Frieman Should Be Discredited in its Entirety

Union organizer Janna Frieman was with bargaining unit nurse Carol McNasby in the main lobby during the afternoon picketing session. Among other things, Ms. Frieman testified about the actions of she and Ms. McNasby, and about their interactions with Hospital representatives. The record evidence includes video of Ms. Frieman and Ms. McNasby in the main lobby, and the video proves that Ms. Frieman testified untruthfully.

b) Janna Frieman Testified That She Was Not Wearing a Picket Sign; The Video Evidence Shows Her Wearing a Picket Sign

Ms. Frieman insisted that when she was in the main lobby with Ms. McNasby, she was not wearing a picket sign. In response to three separate questions, she testified that while Ms. McNasby was wearing a picket sign, she was not:

> Q: When you talk about nurses leafleting, I certainly am clear on the third session in the afternoon with Carol McNasby that she was wearing a sign, you said.
>
> A: Right.
>
> Q: By the way, were you wearing a sign, too?
>
> A: No.
>
> (Tr. 167-168).
>
> Q: In the afternoon, you said Carol McNasby was wearing a sign, but did you say you were not?
>
> A: I was not.
>
> (Tr. 177).
>
> Q: Just so I'm clear, during that afternoon session, Carol is wearing a sign, you are not.
>
> A: Correct.
>
> (Tr. 178).

The video evidence is, of course, irrefutable and it shows that Ms. Frieman is wearing a picket sign for the entire time she is in the main lobby during the afternoon session. (Resp. Exh. 4). In the image taken from the video evidence below, Ms. Frieman and Ms. McNasby appear at the top right; Ms. Frieman is to the left of the easel, marching towards the front door with her back (and picket sign) to the camera, while Ms. McNasby - also wearing a picket sign - is on the right, interacting with an individual in the lobby. Ms. McNasby is wearing

her picket sign on the front of her body, which makes it difficult to see in the image below. (Tr. 267).

(Resp. Exh. 4).

This did not escape the attention of anyone who saw the video:

> JUDGE GIANNASI: And that second person is the union rep?
>
> THE WITNESS: Yes.
>
> JUDGE GIANNASI: And I notice she does have a sign.
>
> THE WITNESS: Yes, she does.
>
> (Tr. 267).

c) Janna Frieman Testified That She Did Not Confront Hospital Visitors While Wearing a Picket Sign; The Video Evidence Contradicts Her Testimony

Ms. Frieman testified that when she was in the main lobby with Ms. McNasby, she did not confront passersby while wearing her picket sign. In response to two separate questions, she testified that while Ms. McNasby was leafleting, she was not:

> Q: Were you handing out leaflets or just her?
>
> A: No, I was not. She was.
>
> (Tr. 162).
>
> Q: Did I ask this already, were you handing out leaflets or just Ms. McNasby?
>
> A: I was not handing out leaflets.
>
> (Tr. 163).

The video evidence is, again, irrefutable and it shows that Ms. Frieman approaching at least one person to hand that person a leaflet in the main lobby during the afternoon session. (Resp. Exh. 4). In the images taken from the video evidence, Ms. Frieman can be seen wearing a picket sign and approaching the person with a leaflet and extending her arm.

In the image below, Ms. Frieman appears at the center top. She is standing halfway between Ms. McNasby and the front doors. She appears in profile. The person she approached is the woman who is walking towards the front door, also in the center top in the image below. She appears with her back to the camera and to the left of Ms. Frieman.

In the image below, Ms. Frieman begins to move towards the woman.

Finally, in the image below, Ms. Frieman can be seen moving even closer to the woman and extending her arm.

d) Janna Frieman Testified That She Was Stationary; The Video Evidence Shows Her Marching Back and Forth in the Lobby

Ms. Frieman testified that when she was in the main lobby with Ms. McNasby, they both stood stationary by the easel on which the Hospital's sign appeared:

> Q: What did you and Ms. McNasby do?
>
> A: We stationed ourselves next to the easel. And as we had -- she was also wearing a sign that was hanging that said a skilled nurse is at your bedside. So she stationed herself right next to the easel and leafleted.
>
> …
>
> A: That was where Crozer had put their new sign with their position about everything that was going on.
>
> Q: And where were you and Ms. McNasby in relation to that?

A: Standing right beside it.

Q: Were you standing beside it towards the area that says visitor seating in this area or towards the information desk?

A: I think I, personally, was standing closer to like on the visitor seating side, but I'm pretty sure Carol was standing right next to it on the other side, towards the information desk.

(Tr. 161-162).

Q: And you said that you guys were standing still?

A: Correct.

Q: So it's not the case that you were walking back and forth in the lobby, during that very time in the afternoon, wearing a picket sign.

A: Definitely not. I mean we had to walk from the door to the place where we stood, but that was the only walking that we did.

(Tr. 177-178).

The video evidence is, once again, irrefutable and it shows that during the approximately four minutes she was in the lobby, Ms. Frieman marched back and forth at least eight times:

(1)	4:17:02.510 - 4:17:31.781	Marching from the front door to the easel.
(2)	4:19:09.087 - 4:18:21.367	Marching from the easel back to the front door.
(3)	4:18:40.19 - 4:18:54.862	Marching from the front door back to the easel.
(4)	4:18:58.465 - 4:19:06.308	Marching from the easel to the center of the hallway.
(5)	4:19:13.850 - 4:19:19.067	Marching from the center of the hallway back to the easel.
(6)	4:19:37.071 - 4:19:40.408	Marching from the easel to the center of the hallway.

(7) 4:19:41.008 - 4:19:46.115 Marching from the center of the hallway back to the easel.

(8) 4:20:17.778 - 4:20:30.964 Marching from the easel to a spot halfway to the front door.

(Resp. Exh. 4).

e) Janna Frieman's Recollection Failed – But Only On Cross-Examination – Which Also Undermined Her Credibility

Ms. Frieman testified with little hesitation and with an apparently perfect recollection on direct. There was only item which she could not recall - the exact number of leaflets handed out by Ms. McNasby. (Tr. 165). However, on cross-examination, Ms. Frieman stated that she could not recall specific matters at least a dozen times. For example:

> Q: Again, if you were there, do you remember seeing somebody or maybe even you, and again, after the conversation with Tony in the morning, kind of gathering up the signs and leaving with the signs, and then whoever stayed behind was not wearing a sign at all?
>
> A: I don't recall that.
>
> Q: Is that something that might have happened and you just don't remember?
>
> A: I don't recall.
>
> (Tr. 170-171).

This is an important point, as Ms. Frieman claimed that after Human Resources Director Tony DiBartolo spoke with them during the morning session, the bargaining unit nurses kept their picket signs on and remained in the lobby. (Tr. 170). Mr. DiBartolo testified that, after he spoke with the bargaining unit nurses in the morning, they removed their picket signs. (Tr. 230). When she was asked whether it happened the way Mr. DiBartolo testified, all she could muster was "I don't recall."

Even though she testified that it was her job on September 3 "to be with the nurses inside the hospital" (Tr. 167), and even though she testified that she was in the lobby during the morning picketing session (Tr. 158, 168), she could not recall whether bargaining unit nurses went into the admissions area:

> Q: Okay. So going back to the morning session when you're in the lobby, did you or any of the nurses you were with go into that admissions area?
>
> A: I don't recall. I did not.
>
> Q: You didn't, okay. Do you know if Alaina did?
>
> A: I do not know.
>
> Q: So you don't know if anyone who was wearing a sign walked into that admissions area.
>
> A: I don't know.
>
> (Tr. 172).

Even more incredibly, Ms. Frieman could not recall where she went inside the Hospital on September 3:

> Q: In terms of the other places you might have been, so you said the lobby and the ED, so that was the morning and the afternoon, you're saying, or the morning and the midday session. Were you in any other places in the hospital?
>
> A: I don't recall.
>
> Q: Do you recall, for example, getting on an elevator in the hospital?
>
> A: I don't recall.
>
> (Tr. 173).
>
> Q: In terms of the -- was one of the places you were on the fourth floor?
>
> A: I don't recall.
>
> Q: Were you on a floor where the waiting area is for the critical care units?

A: I don't recall.

(Tr. 177).

Because the video evidence proves that Ms. Frieman testified untruthfully about some of the key issues in the case - the events in the main lobby on the afternoon of September 3 - and because her testimony was not credible for other reasons, the Hospital submits that Ms. Frieman's testimony should be discredited in its entirety.[9]

f) The Testimony of Human Resources Director Tony DiBartolo Should Be Credited in its Entirety

Human Resources Director Tony DiBartolo provided candid and credible testimony, which was largely uncontroverted. While some portions of his testimony differed from that of Ms. Frieman, Mr. DiBartolo's testimony was confirmed by the video evidence and, for the reasons set forth above, Ms. Frieman's testimony should not be credited.

(1) The First Picketing Session (6:00 a.m. – 8:30 a.m.)

Mr. DiBartolo testified that he first encountered bargaining unit nurses wearing picket signs in the main lobby at 7:00 or 7:15 a.m. There were four or five nurses in the lobby wearing picket signs, and Mr. DiBartolo approached them: "I went up to them and said picket signs, if you want to keep them on, need to go outside with the picket line. You could stay here and handbill without the sign." (Tr. 230). He further testified that, as he was walking away, they

[9] While it is the Hospital's position that Ms. Frieman's testimony should be discredited in its entirety for the reasons set forth above, the Hospital also sought to introduce additional video evidence that would resolve any remaining credibility questions and prove that the Union and bargaining unit nurses were picketing inside the Hospital on September 3. Among other things, the video evidence the Hospital sought to introduce would prove that: the bargaining unit nurses removed their picket signs after Mr. DiBartolo spoke with them; bargaining unit nurses went into the admissions area in the morning; and Ms. Frieman was on the fourth floor and in the waiting area for the critical care units. (Tr. 261-262). The Judge ruled that he would receive only the portion of the video that shows the events of the afternoon of September 3. (Tr. 277-278; Resp. Exh. 4). However, the entire video the Hospital sought to introduce is included on the electronic device received as Respondent's Exhibit 4. By Order dated April 2, 2015, the Board denied the Hospital's Request for Special Permission to Appeal the Judge's ruling. For all the reasons stated on the record in the Hearing and in the denied Request for Special Permission to Appeal the Judge's ruling, Crozer respectfully requests that the Judge reconsider his decision and consider the entire videotape and the offer of proof regarding the picketing in the ED on September 3.

took the signs off and continued to handbill. He had a similar conversation with an individual who was near the information desk; she also took her sign off and continued to handbill. (Tr. 230).

Union organizer Janna Frieman testified that Mr. DiBartolo told the bargaining unit nurses that he "preferred we not wear signs in the lobby." She claimed that they clarified that this did not mean that they could not wear them, so they remained in the lobby with their signs on. (Tr. 159-160, 169-171). As noted above, Ms. Frieman's testimony on a number of key points was directly and conclusively contradicted by the video evidence, and her testimony should be discredited in its entirety. Moreover, Mr. DiBartolo's testimony was consistent with the Hospital's position: the Hospital would not permit bargaining unit nurses in the Hospital wearing picket signs.

(2) The Second Picketing Session (11:00 a.m. – 1:30 p.m.)

Mr. DiBarto testified that he next encountered bargaining unit nurses wearing picket signs in the main lobby at around 11:00 a.m., when he saw Elaina Adams and Teresa Devlin outside the patient registration area along with another person who Mr. DiBartolo assumed was a Union representative. (Tr. 240). Mr. DiBartolo testified that he told them that if they wanted to stay and handbill, they had to remove the picket signs, and he explained that the Hospital considered it picketing. (Tr. 240-241). After this conversation, they left the lobby. (Tr. 254).

Union organizer Janna Frieman testified that she was in the main lobby with at least one bargaining unit nurse during the second picketing session, and that they were not approached by anyone from Hospital management. (Tr. 160). However, Ms. Frieman was not present at the time that Mr. DiBartolo encountered Ms. Adams and Ms. Devlin, and so her

testimony - whether credible or not - does not contradict, and is not relevant to, Mr. DiBartolo's testimony.

(3) The Nature and Extent of Inside Activity on September 3

Mr. DiBartolo testified that there was a management meeting at around 2:00 or 2:30 p.m. on September 3. It was at that meeting that Hospital management became fully aware of the nature and extent of the activity that was taking place inside the Hospital. At the meeting, managers reported that there were people on the patient floors, in the ED, in the registration area, and walking the halls, all with picket signs on. Managers reported that they even gave a handout to a burn patient. (Tr. 242).

After hearing these reports, Mr. DiBartolo testified that they reviewed the video from the areas in question. The video confirmed that people with picket signs were coming from the picket line outside, and were in the lobby, in the ED and other areas, approaching patients and handing them handbills. "[W]e saw them going into the registration area on the lobby, so they went off the lobby, through the door, in the patient area. They went in there and they came out. We saw them on the fourth floor, the ICU unit, with the signs on." (Tr. 243). They also saw bargaining unit nurses wearing picket signs marching down the hallway that extends from the parking garage to the lobby: "[t]hey were walking up and down. I didn't see anyone give out leaflets, but they were walking up and down with the signs. (Tr. 254-255, 256-258). As Mr. DiBartolo testified, the video showed incidents in which multiple persons (more than two) wearing signs were walking up and down different areas of the hospital. (Tr. 265).

Mr. DiBartolo testified that, based upon the reports and the video evidence confirming the reports of persons wearing picket signs marching throughout the hospital, including on patient floors and in the ED and patient registration where they were interacting

with patients, the picketing was not limited to the exterior of the Hospital. Among other things, picketers were coming off the picket line from the outside and they had the same signs on that they were wearing while picketing outside. (Tr. 243-244, 260-261).

(4) The Third Picketing Session (3:30 p.m. – 5:30 p.m.)

Mr. DiBartolo testified that, not long after the management meeting, he encountered Ms. Frieman and Ms. McNasby in the main lobby. He had previously seen them outside picketing. (Tr. 271-274). He testified that they were both wearing picket signs and that Ms. Frieman - who he did not know at the time - was walking back and forth in the lobby. (Tr. 244). While Ms. Frieman testified that she was not wearing a picket sign, and that they were both standing still, her testimony was proven false by the video evidence.

Mr. DiBartolo testified that he approached Ms. McNasby and, as he did so, Ms. Frieman walked over to them. He told them that they could not remain in the lobby while wearing the picket signs because the Hospital considered it picketing: "You came off the [picket] line. You're out here picketing." When Ms. Frieman said she would not take off her sign, Mr. DiBartolo said: "[Y]ou need to take it off if you're going to stay here." (Tr. 244). Mr. DiBartolo testified that this was based upon what he had learned at the management meeting and from the subsequent review of the video evidence. (Tr. 265).

(5) The Testimony of Senior Registration Representative Shana Smelser Should Be Credited in its Entirety

Shana Smelser has worked as a Senior Registration Representative at the Hospital for eight years. She works in the admissions, or patient registration, area which is located just off the main lobby. (Tr. 280-282; Resp. Exh. 3(b)). From her desk, she can see out into the main lobby, and from other sections of the admissions area she can see out into the circular driveway.

(Tr. 282-283, 292). On September 3, Ms. Smelser observed picketing outside in the circular driveway, and inside the main lobby and in the waiting room of the admissions area. (Tr. 284).

During the day on September 3, a number of patients and family members complained about these activities. (Tr. 286-287). One of the complaints related to an incident that Ms. Smelser observed personally:

> JUDGE GIANNASI: What did you see?
>
> THE WITNESS: When the patient and the wife were coming into the admissions office, and the nurse that was picketing forcefully – she gave the pamphlet into the man's hands, and the wife – I brought them back to my registration area and they had complained to me, and I immediately got my director and let him know what had happened. I gave her the information for our patient relations rep. And I apologized to her.
>
> (Tr. 288).

The Union's counsel objected to the characterization of the nurse as "picketing," and Ms. Smelser explained that the nurse was wearing a red shirt and picket sign, and that she had come in from the outside, where the individuals on the picket line were wearing red shirts and carrying or wearing picket signs. (Tr. 284-285, 288-289).

Ms. Smelser's testimony was candid and credible, and was wholly uncontroverted.

(6) The Testimony of Chief Nursing Officer Eileen Young Should Be Credited in its Entirety

Chief Nursing Officer Eileen Young testified that she is responsible for the oversight of the care that is delivered to patients by the nurses at all of the Medical Center's facilities. Among other things, she is responsible for determining whether or not there are issues that might affect the ability of patients to get the care they require. (Tr. 314-315). She testified that the Hospital exists to care for patients, and this involves the "provision of care both on a

physical, emotional, and psychological level, creating an environment of healing." In addition to the physical care needs of patients, the Hospital tries to provide "an environment that's calm and restive, restorative, so that they can focus on healing and getting better." (Tr. 315-316).

Chief Nursing Officer Young testified that there is a concern that patients and families, who are already anxious about coming for care or being ill, would be subjected to added stress or anxiety when confronted with picketing on the Hospital's property. (Tr. 328-329). She testified that the main entrance is used by large numbers of patients and family members, because it is used by patients coming in for admissions and related services, discharged patients, ambulatory surgery patients, and mothers and new babies, among others. (Tr. 324-326). However, she was most concerned about picketing activity inside the Hospital, because it means that even the interior of the health care facility does not provide refuge from the stress and anxiety-inducing activities outside:

> My concern about the activity inside the hospital is that it would begin to overlay and cause concern for patients and families that have now entered into the hospital for care. … I think when patients and their families come into a hospital for care, they expect to have a protected, calm, restorative environment. And I think that if they see the activity outside and then they come inside and they see it again that, and then, oh, my goodness, see it again, and I came here to get myself well or to have my tests and not to worry about activities that may be anxiety producing in the hospital when I'm trying to get my care.
>
> …
>
> My other concern, again, would be that patients and their families are already anxious enough about coming for care or being ill that the added stress or anxiety of either crossing through and having to encounter when they're coming into the hospital for care, be concerned about that as well.
>
> (Tr. 323, 328-329).

Counsel for the General Counsel tried to suggest that this would occur any time patients and families became aware that there was "an ongoing conflict between the hospital and

its employees over working conditions," but Chief Nursing Officer Young did not agree. She noted that getting information about the situation could be helpful, but "it all depends on the how and the context." (Tr. 329-330). Resisting Counsel for the General Counsel's attempts to show that "understanding what the dispute was about might be beneficial," she clarified that: "It might be beneficial for them to understand what they're seeing." (Tr. 330). Again, she emphasized the "how":

> THE WITNESS: I think it has to do with the message and I think it has to do with how the message is delivered.
>
> JUDGE GIANNASI: What do you mean by how the message is delivered?
>
> THE WITNESS: To me, the message is kind of the what it's about. And the how it's delivered is kind of how you deliver the what it's about.
>
> JUDGE GIANNASI: You mean people who would have signs on their persons and are walking around, that is anxiety producing?
>
> THE WITNESS: I think it is, more than if someone offers you a pamphlet and you can choose to just walk by it, versus somebody that's kind of walking around in lines. That to me seems – is sort of much more kind of prominent in your face.
>
> …
>
> Q: That would depend on how far they were from the persons entering or exiting, is that true?
>
> A: In some cases, it would be, because you can see from afar, versus having them right in front of you or having to walk through them.
>
> Q: So you would agree that the further away they are, the less anxiety producing it would be?
>
> A: Yeah, I think so, because they could kind of ignore it, if they wanted to, a little bit more.
>
> Q: And being handed a leaflet, in your opinion, is less anxiety producing that seeing somebody parading back and forth with a sign, is that true?
>
> A: Yes.

(Tr. 330-332).

Chief Nursing Officer Young provided candid and credible testimony about the effect of picketing activities on patient care. Her testimony was wholly unrebutted and should be credited in its entirety.

B. Argument: The Hospital Lawfully Barred Picketing Inside the Hospital

As noted above, it is undisputed that Director of Human Resources Tony DiBartolo told bargaining unit nurse Carol McNasby and Janna Frieman that they that they could not remain in the Hospital lobby while wearing picket signs. However, the nature of Ms. McNasby and Ms. Frieman's activities is in dispute. The Complaint alleges that the Hospital "prohibited and interfered with an off-duty employee who was distributing leaflets in support of the Union … ." In reality, Ms. McNasby and Ms. Frieman were engaged in picketing inside the Hospital and, for the reasons set forth below, the Hospital lawfully barred them from picketing inside the Hospital.

1. Carol McNasby and Janna Frieman Were Picketing in the Main Lobby of the Hospital

The record evidence shows that Carol McNasby and Janna Frieman were both in the main lobby wearing picket signs and, while Ms. McNasby remained near the easel, Ms. Frieman marched back and forth in the lobby. During her four minutes in the lobby, she marched back and forth at least eight times. (Resp. Exh. 4). Under applicable Board law, their conduct constitutes picketing.

a) The Board Has Found that Two Persons with Picket Signs at a Hospital Entrance is Picketing

In District 1199, Hospital and Health Care Employees, 256 NLRB 74 (1981), four union organizers walked back and forth in front of three of the entrances to South Nassau

Communities Hospital and handed out leaflets. Two of the organizers wore placards with union organizing messages. One of the placards was ripped by the wind, and the organizer placed it in her car. The other organizer wore the placard for the full 90 minutes during which they walked in front of the entrances. The sole question was whether the union's actions constituted picketing. The union asserted that it never intended to stop employees from working or to disrupt the hospital's operations in any way. Id. at 75. Significantly, "[n]o evidence was elicited to show that the activity engaged in by the Union's organizers interfered with pickups or deliveries, or was anything but peaceful at all times." Id. at 76, fn. 8.

However, the Judge noted that, "while it may not have been the intent of Respondent to disrupt the Hospital, it is conceivable that that could have been the result."

> Thus, the mere presence of the Union's organizers carrying placards in the entranceways of the Hospital identifying the cause they espouse for all the world to see, for even as short a duration as the record indicates, plus the handbilling of passing cars and other person, and the organizers stating who they represent, are sufficient indicia to bring the activity within the ambit of picketing as defined by the Board. Accordingly, I find that Respondent engaged in picketing on January 24, 1980, without giving the required notice in violation of Section 8(g) of the Act.
>
> Id. at 76 (footnote omitted).

In the instant case, the record evidence shows that bargaining unit nurse Carol McNasby and Union organizer Janna Frieman were both in the main lobby wearing picket signs, and that Ms. Frieman marched back and forth in the lobby, and that they both confronted visitors in the lobby. Thus, their conduct constitutes picketing under District 1199, Hospital and Health Care Employees.

b) The Board Has Found that Persons "Milling Around" with Picket Signs Near a Hospital Entrance is Picketing

In Service Employees Local 535 (Kaiser Foundation), 313 NLRB 1201 (1994), the union organized a press conference in front of the hospital. During the press conference, which lasted 30-45 minutes, approximately 15 persons - including 3 union agents - carried signs with union messages. "Although the record fail[ed] to establish that the participants engaged in organized patrolling, it is clear from the testimony that participants carrying signs milled around in a 30 to 35 feet area in front of the speakers platform and the hospital entrance." Id. at 1201-1202.

The union argued that, absent a showing of actual patrolling, such as a traditional picket line or confrontation with others, and absent the broadcasting of a labor dispute, such as an attempt to influence employees or customers to withdraw work or support, there can be no finding that they engaged in picketing. The Judge disagreed, noting that "any picketing may induce actions by others regardless of the picketers' purpose, thereby creating the risk that the delivery of health services will be disrupted." The Judge concluded that, "regardless of Respondent's intentions, the presence of persons carrying such signs at the hospital entrance could induce action disruptive of patient care." Id. at 1202. The Board agreed:

> In adopting the judge's findings, we note that holding a press conference at a hospital entrance would not, in itself, implicate Sec. 8(g) of the Act. The Respondent, however, did more than hold a press conference at a hospital entrance. Here, approximately 15 people, including agents of the Respondent, carried signs regarding staffing levels at health care institutions and were "milling around" at the hospital entrance. This, as the judge found, was "picketing," notwithstanding that the activity occurred in conjunction with a press conference. …
>
> Id. at 1201, fn. 1.

Thus, even if the Judge were to find that there was no evidence of marching or patrolling in the main lobby, the conduct of Ms. McNasby and Ms. Frieman constitutes picketing under Service Employees Local 535 (Kaiser Foundation).

c) The Board Has Found that Standing Still with Picket Signs is Picketing

In Engelhard Corp., 342 NLRB 46 (2004), the union organized a protest at a hotel where the employer's shareholder meeting was taking place. The union and employees engaged in "silent protest" in which "individuals carrying placards stood at hotel entrances, and that pickets handed leaflets to cars which stopped to receive them." Id. at 59. The Judge, affirmed by the Board, held that:

> Even if the demonstrators merely stood with picket signs talking to each other, picketing has been proven. Patrolling either with or without signs is not essential to a finding of picketing.
>
> Id. at 59.

The record evidence - the video of the incident - clearly shows that, during her four minutes in the lobby, Ms. Frieman marched back and forth at least eight times. (Resp. Exh. 4). Nonetheless, the Board's holding in Engelhard Corp. confirms that even if Ms. McNasby and Ms. Frieman were simply standing still in the lobby with their picket signs, their conduct constitutes picketing.

d) The Board Will Not Separate the Conduct of Union Organizer Janna Frieman from the Conduct of Bargaining Unit Nurse Carol McNasby

In Engelhard Corp., the Board noted that some of the non-employees wore picket signs and distributed handbills, but none of the employees engaged in either of those activities. Rather, "Respondent's employees stood next to the picketers and handbillers." 342 NLRB at 47. Despite this, there was no question that picketing had occurred.

The Judge found that the union had not clearly and unmistakably waived the employees' right to engage in union or concerted activities including picketing, and the Board

agreed: "[W]e agree with the judge that the employees did not contravene the no-strike/no-lockout provision **when they engaged in the picketing**." Id. at 46 (emphasis added).

In the instant case, the Hospital maintains that the actions of the employee (Ms. McNasby) and the Union organizer (Ms. Frieman) constitute picketing. However, the Board has found that even in cases in which the employee was not wearing a picket sign, the employee was engaged in picketing by standing next to non-employees who were wearing or carrying picket signs. Thus, in this case, in which Ms. McNasby is also wearing a picket sign, there can be no argument that she and Ms. Frieman were not engaged in picketing.

e) Even the Union Representatives and Bargaining Unit Nurses Recognized that the Hallmark of Picketing is Wearing a Picket Sign

Even Union representative Paul Muller recognized that the hallmark of picketing is wearing a picket sign. When Mr. Muller testified about taking bargaining unit nurse Teresa Devlin to the main entrance to hand out leaflets on June 3, he noted that he took Ms. Devlin from the picket line and said:

> And I said, Teri, would you go with me to the front -- would you like to go with me to the front door and leaflet. And she said sure. I said you'll have to put your sign down; we're just going to be leafleting. So I gave her a stack of leaflets, I kept a stack of leaflets, and we walked towards the front door up Medical Center Boulevard.
>
> (Tr. 107-108).

Ms. Devlin confirmed that Mr. Muller "said take your sign off, and take the leaflets and try to pass them out up by the entrance" because they were going to leaflet and not picket. (Tr. 134).

Thus, even the Union recognized that wearing a picket sign while handing out leaflets would constitute picketing and would not be permitted.

2. The Presence of a Traditional Picket Line on September 3 Confirms that Carol McNasby and Janna Frieman's Conduct Constitutes Picketing

The conduct of Carol McNasby and Janna Frieman in the main lobby on September 3 cannot be separated from the other events of that date. Consistent with the notice the Union provided pursuant to Section 8(g), they engaged in traditional ambulatory picketing during three picketing sessions on September 3. (Tr. 241-242). This included picketing in the circular driveway immediately outside the main lobby. This is significant because the Board has found picketing in the absence of patrolling or other ambulation when the conduct in question was preceded by traditional, ambulatory picketing.

a) Even the Display of Stationary Signs or Distribution of Handbills is Found to be Picketing When Connected to Traditional Ambulatory Picketing

In Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (2010), the Board held that a union's display of stationary banners - in a context in which "no one patrolled or carried picket signs" - did not violate Section 8(b)(4)(ii)(B) of the Act. Id. at 1. The Board in Eliason & Knuth noted that "picketing generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite." Id. at 6. However, the Board specifically noted the following exception:

> We also acknowledge that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation. However, each of the prior cases is distinguishable from the banner displays at issue here. In many of the prior cases, the display of stationary signs or distribution of handbills was preceded at the same location or accompanied at other locations by traditional, ambulatory picketing.
>
> Id. at 8 (citations omitted).

If the Board recognizes that the display of stationary signs constitutes picketing where the conduct was preceded at the same location by traditional, ambulatory picketing, then a fortiori, such conduct constitutes picketing where it is accompanied at the same location and at the same time by traditional ambulatory picketing. That is precisely what we have in the instant case, as the Union was engaged in traditional picketing outside the Hospital, including picketing in the circular driveway immediately outside the main lobby. The Union's outside picketing occurred during all three picketing sessions, including the afternoon picketing session during which Ms. McNasby as Ms. Frieman were told that they could not wear picket signs in the lobby.

The Board in Eliason & Knuth noted that it had "pointed out the relevance of this distinguishing fact" in an earlier case in which the Board observed that: "[f]ollowing in the footsteps of the conventional picketing which had preceded it, this conduct was intended to have, and could reasonably be regarded as having had, substantially the same significance for persons entering the Company's premises." Id. at 8 (citations and footnote omitted). Here, too, the conduct of Ms. McNasby and Ms. Frieman could reasonably be regarded as having substantially the same significance as the outside picketing for those patients, family members and visitors who had to cross the Union's picket line to get into the lobby only to be confronted by Ms. McNasby and Ms. Frieman walking around the lobby wearing picket signs.

b) Even the Display of Stationary Signs is Found to be Picketing When the Display is of Traditional Picket Signs Used in Ambulatory Picketing

The Board in Eliason & Knuth noted another exception to the proposition that picketing generally involves persons carrying picket signs and patrolling back and forth before an entrance to a business or worksite: "In many of the prior cases, the [stationary] display was of traditional picket signs of the same type used in ambulatory picketing." Id. at 8 (citations

omitted). Again, that is precisely what we have in the instant case, as Ms. McNasby and Ms. Frieman were wearing the same picket signs that were worn by the picketers on the Union's outside picket line. Indeed, Ms. McNasby and Ms. Frieman had been picketing outside and came into the main lobby while still wearing their picket signs. (Tr. 273-274).

3. The Presence of Roaming Groups of Picketers Inside the Hospital on September 3 Confirms that Carol McNasby and Janna Frieman's Conduct Constitutes Picketing

The record evidence shows that the conduct of Ms. McNasby and Ms. Frieman was only the tip of the iceberg on September 3. Groups of employees and Union representatives came in from the outside picket line and marched throughout the Hospital on September 3. The presence of these inside picketers confirms that Ms. McNasby and Ms. Frieman were picketing.

a) Groups of Picketers Marched Throughout the Hospital on September 3

Human Resources Director Tony DiBartolo testified that the Hospital's video cameras recorded picketers coming into the Hospital from the picket line outside, and marching through the lobby, patient registration, and the Emergency Department. The cameras also recorded the picketers on the patient floors, including the fourth floor and the ICU unit. Finally, the cameras recorded bargaining unit nurses wearing picket signs marching down the hallway that extends from the parking garage to the lobby. (Tr. 242-243, 254-258).

b) Groups of Picketers Confronted Patients, Family Members and Visitors Inside the Hospital on September 3

Senior Registration Representative Shana Smelser testified that she observed picketers march into the Hospital from the outside picket line and march through her patient registration area, where they accosted patients and family members. (Tr. 284). A number of patients and family members complained about these activities. (Tr. 286-287). Ms. Smelser also

observed a picketer in the admissions office forcefully shoving a leaflet into the hands of a burn victim. He and his wife complained about this. (Tr. 288).

The Hospital also made an offer of proof regarding a witness in the Emergency Department who would testify that she observed picketing outside the Emergency Department and two picketers who were inside the Emergency Department waiting area accosting patients and family members. The picketers were wearing the same red shirts and the same picket signs as those who were picketing outside. One of the picketers was a Union representative and they were both handing out leaflets to patients and family members while wearing picket signs. (Tr. 310-311).

c) The Union Unlawfully Extended Its Picket Line Into the Hospital on September 3

The record evidence is clear: Ms. McNasby and Ms. Frieman were part of a larger group of bargaining unit nurses and Union representatives that came into the Hospital from the outside picket line, while wearing the same picket signs that they had been wearing (and that others were wearing) on the outside picket line, and marched throughout the Hospital. By this conduct, the Union unlawfully extended its picket line into the Hospital on September 3.

The conduct of Ms. McNasby and Ms. Frieman is inseparable from the conduct of the groups of picketers who marched throughout the Hospital on September 3. Once the Hospital learned of the nature and extent of this inside picketing on September 3, it decided to stop it. Ms. McNasby and Ms. Frieman were in the main lobby and were the first picketers encountered by Mr. DiBartolo after this decision had been reached.

4. The Presence of Picketers Inside a Hospital Creates a Risk of Interference with Patient Care and is Inconsistent with the Special Protections Afforded Healthcare Institutions Under the Act

The record evidence shows that there are legitimate concerns about the effect of picketing – and especially picketing inside a Hospital – on patient care. The testimony of Chief Nursing Officer Eileen Young, which was uncontroverted, established that there is a concern that patients and families, who are already anxious about coming for care or being ill, would be subjected to added stress or anxiety when confronted with picketing on the Hospital's property. (Tr. 328-329). In particular, she expressed the most concern about picketing activity inside the Hospital, because it means that even the interior of the health care facility does not provide refuge from the stress and anxiety-inducing activities outside. (Tr. 323, 328-329).

a) The Act Provides Special Protection to Healthcare Institutions

In Alexandria Clinic, P.A., 339 NLRB 1262 (2003), the Board explained the policy reasons behind the enactment of Section 8(g):

> Until 1974, health care employees employed by nonprofit hospitals were not entitled to collective-bargaining rights under the Act. Congress amended the Act that year by extending the Act's jurisdiction to cover all nonprofit health care institutions, thereby bestowing upon those employed by such institutions the same collective bargaining rights possessed by employees in other industries. But accompanying this extension of the Act's protections was a tradeoff: to address the concerns of health care business groups who feared that extending coverage to this new group of employees might lead to an increased disruption in health care services caused by labor disputes, Section 8(g) was added to the amendments in order to give the health care institutions sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care.
>
> 339 NLRB at 1263-1264 (citations omitted).

Stated more simply, the Board noted that "Congress chose to treat the health care industry uniquely because of its importance to human life, cognizant of the possibility that 'disruption in patient care of even a few hours may cost lives.'" Id. at 1266 (citations omitted).

b) The Protections Afforded Healthcare Institutions Under the Act Are Intended to Avoid Any Possibility of Interference with Patient Care

The Board has repeatedly held that the possibility of an interference with or disruption to patient care is of great concern. In cases in which the Board has addressed the question whether picketing at a hospital has occurred, the Board has noted that:

> Thus, while it may not have been the intent of Respondent to disrupt the Hospital, it is conceivable that that could have been the result. District 1199, Hospital and Health Care Employees, 256 NLRB 74, 76 (1981).
>
> Therefore, regardless of Respondent's intentions, the presence of persons carrying such signs at the hospital entrance could induce action disruptive of patient care. Service Employees Local 535 (Kaiser Foundation), 313 NLRB 1201, 1203 (1994).
>
> In the present case, the conduct of the participating employees and other individuals had the potential to influence other employees to withhold their labor, or to deter suppliers or their employees from attempting to enter the clinic. Those *potential* consequences are sufficient to bring the Union's conduct within the ambit of Section 8(g). Correctional Medical Services, 349 NLRB 1198, 1201 (2007).

Thus, while the evidence demonstrates that picketers inside the Hospital accosted patients, family members and visitors, and caused a certain amount of disruption, it is irrelevant that there may not have been a major interference with or disruption to patient care. The protections afforded healthcare institutions under the Act are intended to avoid any possibility of such disruptions.

c) The Hospital Permitted Picketing on Exterior Property on September 3 Because of a Pending NLRB Settlement

The Hospital anticipates that Counsel for the General Counsel, or the Union's counsel, may argue that because the Hospital permitted picketing on its exterior property on September 3, it has less of a basis to argue that picketing inside the Hospital is impermissible. This argument should be rejected.

First, the uncontroverted testimony of multiple witnesses confirmed that the Hospital only permitted picketing on its exterior property on September 3 because, at the time, there was a pending NLRB settlement of the Union's charge that it was unlawfully denied access to the exterior property to picket on June 3. (Tr. 343-345). The Hospital's Vice President of Human Resources testified that the Hospital had never agreed that picketing should be permitted on its property, but agreed to enter into the settlement to resolve the unfair labor practice charge and "in the interest of trying to continue negotiations along." (Tr. 343). Vice President Bilotta testified that the Hospital allowed picketing on the exterior property because that was consistent with the terms of the settlement. It was only later that the Hospital learned that the Union opposed the settlement and, for that reason, there was no final settlement. (Tr. 345).

Second, there is a significant and meaningful difference between picketing on the exterior property and picketing inside the Hospital. While it is the Hospital's position that the Union may not picket on its exterior property, even if the law were to permit picketing on the exterior property, the Hospital would nonetheless argue that picketing inside the Hospital should not be permitted.

d) The Hospital's Communications Have No Bearing on the Question of Picketing

While Counsel for the General Counsel made much of the fact that the Hospital had communicated its position in the negotiations, the Hospital's communications have no legal bearing on the question whether certain conduct constitutes picketing, or the question whether picketing is permissible inside the Hospital.

In addition to the fact that there is no legal significance to the Hospital's communications about the negotiations and the picketing, the record evidence shows that there is no practical significance to those communications. That is, the concerns about disruption to patient care that are raised by picketing on Hospital property and especially inside the Hospital, are not raised by the Hospital's written communications. As the Chief Nursing Officer explained, this is because context matters. When there is picketing occurring on Hospital property, it is helpful to patients to understand what they are seeing. (Tr. 330). However, she emphasized that the way the message is delivered makes a difference; specifically, written communications are less likely to cause patients stress and anxiety than picketing. (Tr. 330-332).

5. The Hospital Lawfully Barred the Union Representative and Bargaining Unit Nurse from Picketing Inside the Hospital

For the reasons set forth above, Board law confirms that the conduct of Ms. Frieman and Ms. McNasby on September 3 constituted picketing. As was demonstrated in Section II B, the balancing test required by Supreme Court and Board precedent makes clear that the Hospital could bar the Union and bargaining unit nurses from picketing on exterior Hospital property. If picketing is not permitted on exterior Hospital property, then it is not permitted, a fortiori, in the interior of the Hospital.

6. The Hospital Did Not Threaten an Employee with Reprisals for Wearing a Sign in Support of the Union

According to Ms. McNasby, Employee Relations Manager Charlie Reilly approached and told them that they "were going to have to leave or [they] were going to get in trouble." (Tr. 189). Ms. McNasby testified that Mr. Reilly then turned to leave and Human Resources Director Tony DiBartolo then approached and "said I wasn't allowed to be standing in the lobby with my sign on" and that she would have to leave. (Tr. 189). Ms. Frieman testified that hardly any time elapsed between the conversation with Mr. Reilly and the conversation with Mr. DiBartolo: "It was like one after another, as I recall." (Tr. 165-166).

The fact that Mr. DiBartolo appeared immediately after Mr. Reilly is confirmed by the video evidence. Mr. Reilly speaks with Ms. McNasby and Ms. Frieman for approximately 40 seconds, from 4:20:05 until 4:20:45. As Mr. Reilly begins to walk away, Mr. DiBartolo appears in the lobby. He walks past Mr. Reilly and approaches McNasby and Ms. Frieman and is speaking with them at 4:21:30. (Resp. Exh. 4).

Assuming arguendo that Mr. Reilly made the comments as alleged, there is no violation here. The comments of Mr. Reilly and Mr. DiBartolo were essentially simultaneous. While Mr. Reilly may not have explained in detail what he meant when he told Ms. McNasby and Ms. Frieman that they would have to leave or they "were going to get in trouble," Mr. DiBartolo did. As Ms. McNasby acknowledged, he explained that she "could not be standing in the lobby with the sign on." (Tr. 188-190).

Thus, there were no threats of reprisals, specified or not. Between the comments of Mr. Reilly and Mr. DiBartolo, Ms. McNasby and Ms. Frieman were simply told that they could not remain in the lobby while wearing their picket signs.

V. Allegation #4: Respondent did not Interfere with or Restrain Employees in the Exercise of their Section 7 Rights on September 21, 2014 by Sending an Email to Paramedics Regarding the Picket Line

A. Statement of Facts

On September 21, 2014, Respondent's Assistant EMS Chief Lawrence Worrilow sent an email to all employees in the paramedic bargaining unit regarding the nurses' strike scheduled for the same day. (Jt. Exh. 1, ¶ 15). In the e-mail, Mr. Worrilow informed members of the paramedic bargaining unit that, while on duty, they were not to "show any signs of support" such as blowing the EMS vehicle's "horns/sirens, waving/clapping or cheering" as they crossed the nurses' picket line. (Jt. Exh. 15, p. 2). Mr. Worrilow further cautioned employees that there were "numerous undercover outside security personnel on or around the property . . . ." (Jt. Exh. 15, p. 2).

There is no evidence in the record suggesting that any employees heeded Mr. Worrilow's request to refrain from showing support as they crossed the picket line; nor is there any evidence suggesting employees believed Mr. Worrilow's claims of undercover security. In fact, Paramedic Christopher Yates participated in picketing with the nurses on September 21 and 23, 2014. (Tr. 199-200).

Mr. Worrilow was not authorized to send this e-mail (Jt. Exh. 17, p.1), and it was inconsistent with Respondent's policies regarding paramedics showing support by blowing EMS vehicle horns, waving/clapping, and cheering. (Jt. Exh. 17, p.1; Tr. 194, 195, 203). Even though there is no evidence suggesting employees heeded Mr. Worrilow's request or warning, on November 7, 2014, Respondent's Administrative Director for Business Development and Emergency Management Deborah Love e-mailed all employees who received Mr. Worrilow's September 21 e-mail and explicitly informed them that Mr. Worrilow "did not have the authority

to send this message and [Respondent] disavow[s] and repudiate[s] it." (Jt. Exh. 1, ¶ 17; Jt. Exh. 17, p.1). In her e-mail, Ms. Love quoted Worrilow's statements regarding signs of support and undercover security, and stated that neither "reflects Crozer policy, procedure, rules or practice." (Jt. Exh. 17, p. 2).

Ms. Love went on to explain that on-duty employees are free to engage in the types of support referenced in Mr. Worrilow's e-mail, and expressly stated that "it was wrong and we [i.e., Respondent] repudiate" Mr. Worrilow's directives. (Jt. Exh. 17, p. 2).

Ms. Love also explained that there were no undercover security personnel on or around the property during the strike, and the security personnel present that day were not instructed to identify which employees were engaging in protected concerted activity. (Jt. Exh. 17, p. 2). Love concluded her e-mail by stating, "Again, we repudiate [Mr. Worrilow's] e-mail and have taken other appropriate remedial action to ensure that this is not repeated in the future." (Jt. Exh. 17, p. 2).

1. Credibility Determinations

The facts regarding Mr. Worrilow's and Ms. Love's e-mails are largely undisputed. The Parties stipulated that both e-mails were sent to employees in the paramedics bargaining unit on the dates specified above. (Jt. Exh. 1, ¶¶ 15, 17). Furthermore, General Counsel's witnesses, Paramedics Christopher Yates and Michael Kelly, testified that Respondent did not have a rule in place prohibiting paramedics from cheering, waving, or otherwise showing support for other organizations while they were on duty. (Tr. 194, 195, 203). Both paramedics also stated they had shown support in the community by engaging in these activities in the past. (Tr. 194, 195, 203). There is no evidence that any employee refrained from showing support for the picketers, nor is there any evidence suggesting employees were disciplined for showing support.

B. Argument: Lawrence Worrilow's Email did not Interfere with Employees' Section 7 Rights

General Counsel alleges that Respondent violated the Act when its Assistant EMS Chief Lawrence Worrilow instructed paramedics via e-mail not to show support for picketing employees, and warned them that there were undercover security guards on Respondent's premises on September 21, 2014. (Jt. Exh. 15). However, because this e-mail would not reasonably tend to interfere with employees' rights and the Hospital repudiated Mr. Worrilow's e-mail, any allegation that the Hospital threatened employees for engaging in Section 7 activities should be dismissed. Furthermore, Mr. Worrilow's e-mail did not threaten employees with unlawful surveillance of Section 7 activities because an employer may lawfully observe open and public Section 7 activities on its property without running afoul of the Act.

1. Mr. Worrilow Did not Threaten or Otherwise Interfere with Employees' Section 7 Rights

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in their exercise of Section 7 rights. However, the Board has stated that "[n]ot every interference with employee rights rises to the level of an unfair labor practice; . . . marginal infringements do not violate the Act." Albertson's, Inc., 351 NLRB 254, 256 fn.8 (2007) (quoting NLRB v. Motorola, 991 F.2d 278, 283 (5th Cir. 1993), denying enf. in relevant part, 305 NLRB 580 (1991)). As such, comments that are "simple mistake[s]" that are "quickly and effectively corrected soon after" do not warrant a Board remedy. Albertson's, 351 NLRB at 256; see also Motorola, 991 F.2d at 283.

Here, Mr. Worrilow mistakenly informed paramedics that they were not to show support for picketers. These comments were inconsistent with the Respondent's well-established policies and practices regarding paramedics showing support for people or causes while on duty.

(Jt. Exh. 17, p.1; Tr. 194, 195, 203). As such, Mr. Worrilow was not authorized to send this e-mail, and he was acting outside the scope of his duties by doing so. (Jt. Exh. 17). This type of "marginal infringement" does not constitute a violation of the Act warranting a Board remedy because, as the record demonstrates, paramedics showed support for the picketers in spite of Mr. Worrilow's unauthorized e-mail. (Tr. 199-200).

2. Mr. Worrilow Did not Threaten Employees with Unlawful Surveillance

Mr. Worrilow's comments regarding undercover security personnel on and around Hospital property did not violate the Act. It is well-established that "an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance." Sprain Brook Manor Nursing Home, LLC, 351 NLRB 1190, 1191 (2007) (citing Fred'k Wallace & Son, Inc., 331 NLRB 914, 915 (2000). As such, an employer is free to observe open, public union activity so long as it does not engage in any extraordinary conduct such as videotaping, taking pictures, writing down names, taking notes, or intimidating or threatening employees. See, e.g., Airport 2000 Concessions, LLC, 346 NLRB 958, 959 (2006); Aladdin Gaming, 345 NLRB 585 (2006).

Here, Mr. Worrilow mistakenly informed employees that there would be undercover security personnel on Hospital premises that would be able to observe employees engaging in open, public activity such as blowing EMS horns and sirens, waving, clapping and cheering. (Tr. Exh. 15). Although Mr. Worrilow's comments were factually inaccurate, they were not unlawful because they were consistent with an employer's right to observe open and obvious protected concerted activities on its premises. See Sprain Brook, 351 NLRB at 1191. Therefore, Mr. Worrilow did not unlawfully create an impression of surveillance, but merely

reinforced to employees that their public activities could be observed lawfully by Respondent's security and other personnel.

3. Ms. Love's Email Effectively Disavowed and Repudiated Mr. Worrilow's September 21 Statements

It is well-established that an employer will not be found to have violated the Act if it effectively repudiates otherwise unlawful statements. See, Action Mining, 318 NLRB 652, 654 (1995); Stanton Industries, 313 NLRB 838, 849 (1994); Gaines Electric, 309 NLRB 1077, 1081 (1992); Passavant Memorial Hospital, 237 NLRB 138 (1978). "For a repudiation to be effective, it must be timely, unambiguous, specific in nature to the coercive conduct, free from other proscribed conduct, and adequately published to the employees involved. Additionally, it must set forth assurances to employees that no interference with their Section 7 rights will occur in the future, and . . . there must in fact be no unlawful conduct by the employer after publication of the repudiation." Action Mining, 318 NLRB at 654 (citing Passavant, 237 NLRB 138).

Even assuming arguendo that Mr. Worrilow's e-mail did interfere with Section 7 activities, any violation of the Act was effectively repudiated by Ms. Love's e-mail. (Jt. Exh. 17). Ms. Love's e-mail was timely in that it occurred reasonably soon after Mr. Worrilow's e-mail. See Broyhill Co., 260 NLRB 1366 (1982) (finding repudiation to be timely despite five-week delay between unlawful acts and repudiation). (Jt. Exhs. 15 and 17). Ms. Love's e-mail also unambiguously and specifically addressed Mr. Worrilow's allegedly unlawful statements by quoting them individually and specifically stating that neither was authorized or factually accurate. (Jt.. Exhs. 15 and 17). Furthermore, Ms. Love's e-mail did not contain any proscribed statements, and was distributed to all employees who received Mr. Worrilow's e-mail. (Jt.. Exhs. 15 and 17). Ms. Love also assured employees that no interference with their Section 7 rights would occur in the future by affirming that "[w]hile employees are on duty they are permitted to

show support for protected, concerted activity such as a lawful strike or picketing through words, waving, clapping, cheering or other forms of expression" and informing employees that the Respondent had "taken other appropriate remedial action to ensure that [statements like Mr. Worrilow's] are not repeated in the future." (Jt. Exh. 17). Finally, the Charging Party and the General Counsel do not allege that Respondent thereafter engaged in any conduct that was inconsistent with Ms. Love's repudiation.

For the reasons stated above, even if Mr. Worrilow's e-mail was unlawful, Ms. Love's e-mail effectively repudiated Mr. Worrilow's conduct. As such, any allegations regarding Mr. Worrilow's e-mail should be dismissed.

VI. Allegation #5: Respondent did not Interfere with or Restrain Employees in the Exercise of their Section 7 Rights through its Maintenance of a Lawful Solicitation Policy

A. Statement of Facts

Prior to January 30, 2015, Respondent's Administrative Policy and Procedure Manual ("Manual") contained a Solicitation Policy stating, inter alia, "Solicitation of patients or visitors by anyone for any purpose on [Respondent's] property is strictly prohibited." (Jt. Exh. 1, ¶ 4; Jt. Exh. 4(a)). This policy was revoked and replaced on January 30, 2015. (Jt. Exh. 1, ¶ 4; Jt. Exh. 4(a)).

The record is replete with evidence that this policy was not enforced. For example, Union representative Andrew Gaffney testified that leaflets were distributed on June 3 and September 3, 2014. (Tr. 42, 43). Mr. Gaffney also testified that he had distributed leaflets in the hospital prior to those dates, and no one at the hospital raised any issues regarding who received these leaflets. (Tr. 87). Union representative Paul Muller also testified that he and bargaining unit member Teresa Devlin had leafleted "at the doors of the hospital" before June 3,

2014. (Tr. 107, 109, 123-24). Union organizer Janna Frieman also testified regarding the extensive handbilling that took place within the Hospital on September 3, 2014. (Tr. 167-170). Similarly, Respondent's former Security Manager, Ryan Clarke, testified that on June 3, 2014, Respondent's position was that employees were free to distribute leaflets on Hospital property. (Tr. 308). Director of Human Resources Tony DiBartolo also confirmed that employees were allowed to handbill on Hospital property on June 3, 2014 (Tr. 252) and September 3, 2014 (Tr. 241, 251, 274).

1. Credibility Determinations

The Parties agree that prior to January 30, 2015, Respondent's Administrative Policy and Procedure Manual contained a Solicitation Policy stating, *inter alia*, "Solicitation of patients or visitors by anyone for any purpose on [Respondent's] property is strictly prohibited." (Jt. Exh. 1, ¶ 4; Jt. Exh. 4(a)). Furthermore, witnesses for both sides testified that distributing materials to patients and visitors had been allowed on Hospital property while the Manual contained the Solicitation Policy at issue.

The only credibility determinations that must be made in determining whether this policy was enforced involve whether Union members and employees were actually told they were not allowed to handbill on June 3 and the nature of the conduct that occurred inside the Hospital on September 3. For the reasons stated in Sections II,A,5, III,A,1, and IV,A,3, supra, any issues of credibility should be resolved in favor of Respondent's witnesses.

B. Argument: The Hospital's Solicitation Policy in Effect Prior to January 30, 2015 was Lawful

General Counsel and the Union allege that Section II.A. of Respondent's former Solicitation Policy was unlawful. That portion of the Policy stated that "[s]olicitation of patients

or visitors by anyone for any purpose on [Respondent's] property is strictly prohibited." (Jt. Exh. 1, ¶ 4; Jt. Exh. 4(a)). For the reasons stated below, this allegation must be dismissed.

The Board holds, in determining whether the maintenance of a work rule violates Section 8(a)(1), that the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 (2004). If it does not explicitly restrict Section 7 rights, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

The Board has also stated that a ban on solicitation of patients and visitors on hospital premises is lawful where such a ban is necessary to avoid disruption of patient care or disturbance of patients. See, e.g., Enloe Medical Center, 345 NLRB 874, 875 (2005), citing NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 779 (1979); UCSF Stanford Health Care, 335 NLRB 488, 527 (2001), enfd. in relevant part, 325 F.3d 334 (D.C. Cir. 2003) (quoting St. John's Hospital & & School of Nursing, 222 NLRB 1150 (1976), in stating "the primary function of a hospital is patient care and . . . a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted"). However, policies that prohibit employees from soliciting patients and visitors "regardless of where or when such activity occurs" are considered overly broad. Carney Hospital, 350 NLRB 627, 643 (2007)

(finding policy prohibiting "[s]olicitation or distribution to patients and visitors . . . *at all times*" to be overly broad (emphasis added)).

The Solicitation Policy would not reasonably tend to chill employees' Section 7 rights. For one, the geographically limited restriction on solicitation of patients and visitors is consistent with the Respondent's need to provide a tranquil atmosphere essential to its patient care functions. UCSF Stanford Health Care, 335 NLRB at 527. The justification for such a policy was demonstrated by Ms. Smelser's testimony regarding the burn victim who had a leaflet "forcefully" shoved into his injured hands by a picketer, causing the victim and his wife to complain about the conduct. (Tr. 287-88). Therefore, Respondent's maintenance of the Solicitation Policy would not unreasonably chill employees' Section 7 rights.

Even though strict enforcement of the policy would have been justified based upon the nature of Respondent's patient care responsibilities, it did not prohibit all forms of solicitation or handbilling of patients or visitors. As stated by several General Counsel witnesses, Respondent has regularly allowed employee solicitation of patients and visitors on its premises, including the inside of the Hospital, despite the wording of the policy. (Tr. 42, 43, 87, 107, 109, 123-24, 167-170). Respondent's agents were instructed to allow such solicitation and handbilling. (Tr. 308).

Based on Respondent's hands-off approach to solicitation of patients, a reasonable employee would not construe the Solicitation Policy as limiting his or her ability to engage in Section 7 activities. Furthermore, there is no allegation that the Solicitation Policy was promulgated in response to union activity. Finally, Respondent withdrew the policy at issue and implemented a policy that was consistent with its practices on January 31, 2015. (Jt. Exh. 1, ¶ 4; Jt. Exh. 4). Therefore, a remedial order would be inappropriate in this instance.

VII. Allegation #6: Respondent did not Refuse to Bargain regarding the Union's Request for Copies of Joint Commission Reports

A. Statement of Facts

The Crozer-Chester Medical Center and PASNAP have a collective bargaining agreement, which was effective from June 9, 2011 through June 8, 2014. (Jt. Exh. 1, ¶ 2, Jt. Exh. 2). The parties began negotiations for a successor agreement on April 7, 2014. (Tr. 353). On April 9, Bill Cruice sent Elizabeth Bilotta a letter requesting information "in connection with our ongoing collective bargaining negotiations." (Jt. Exh. 6). The letter included, among other items, a request for "[c]opies of all JCAHO hospital surveys for the past three years." JCAHO stands for the Joint Commission on Accreditation of Hospital Organizations. (hereinafter the "Joint Commission"). (Tr. 33).

The Joint Commission is an independent not-for-profit organization that accredits and certifies more than 20,500 health care organizations and programs in the United States. (Jt. Exh. 1, ¶ 33). Joint Commission accreditation and certification is recognized nationwide as a symbol of quality that reflects an organization's commitment to meeting certain performance standards. (Jt. Exh. 1, ¶ 33). The Joint Commission's peer review process is a "procedure for evaluation by professional health care providers of the quality and efficiency of services ordered or performed by other professional health care providers, including practice analysis and the compliance of a hospital with the standard set by an association of health care providers with applicable laws, rules, and regulations." (Jt. Exh. 1, ¶ 34). The "peer review process of the Joint Commission that applies to all surveyed acute care hospitals applied at all times to Crozer Keystone Health System, including Crozer-Chester Medical Center." (Jt. Exh. 1, ¶ 34).

On April 25, the Hospital responded to each of PANSAP's requests. (Jt. Exh. 7). Regarding the request for Joint Commission surveys, the Hospital directed the Union to "the

Pennsylvania Department of Health website where JCAHO hospital surveys conducted at Crozer could be found." (Jt. Exh. 7). This included a July 3, 2013 letter from the Joint Commission to Patrick Gavin, President of Crozer Chester Medical Center and Executive Vice President and Chief Operating Officer of Crozer Keystone Health System. (Jt. Exh. 31). The letter began by stating the purpose of the Joint Commission's last survey visit: "[t]his letter confirms that your March 19, 2013-March 22, 2013 unannounced full resurvey was conducted for the purposes of assessing compliance with Medicare conditions for hospitals through the Joint Commission's deemed status survey process." (Jt. Exh. 31). It continued that the Joint Commission was removing areas of deficiency because of the Hospital's "submission of evidence of standard compliance…and the successful on-site Medicare Deficiency Follow-Up event." (Jt. Exh. 31). These areas were in Governing Body, Infection Control, and Surgical Services. (Jt. Exh. 31). Because the deficiencies were resolved, the Joint Commission granted Crozer accreditation with an effective date of March 23, 2013. (Jt. Exh. 31).

On May 7, Andrew Gaffney sent Elizabeth Bilotta an email addressing Crozer's April 25th response. (Jt. Exh. 8). The email stated "[w]ith respect to the Joint Commission information, the Union is requesting the actual surveys results delivered to Crozer by the Joint Commission for the last 3 years." (Jt. Exh. 8). Mr. Gaffney clarified that the Union was requesting "non-public documents and correspondence from the Joint Commission and any recommendations or deficiencies identified from the unannounced surveys. This includes but is not limited to identified deficiencies in: Governing Body, Infection Control, and Surgical Services." (Jt. Exh. 8, Tr. 39).

On May 16, Ms. Bilotta, by letter, responded to the Union's request by stating:

> We do not believe the information requested is relevant or necessary for management[10] [sic] to fulfill its role of bargaining representation [sic]. Moreover, the Joint Commission (TJC) is considered a Review Organization under the Pennsylvania Peer Review Protection Act 63 P/S. Section 425.1. Thus any documents, reports, or recommendation prepared or issued by TJC are confidential and protected from disclosure. Furthermore, by disclosing such information, the health system would lose its peer review privileges. (Jt. Exh. 9).

The Pennsylvania Peer Review Protection Act ("PRPA"), to which the Hospital referred, provides that the "proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence." (Jt. Exh. 5).

On May 19, the Union, through Bill Cruice, responded to Ms. Bilotta's letter and reiterated its request for the surveys. (Jt. Exh. 10). He claimed that the surveys were relevant because "staffing levels and its impact on patient care and patient safety are central issues in our negotiations." (Jt. Exh. 10). Mr. Cruice also disputed the confidentiality of the information, stating that the Hospital's "reliance on the Peer Review Protection Act to evade [its] obligation under the National Labor Relations Act is mistaken and has no foundation in Board law." (Jt. Exh. 10).

On May 20, Ms. Bilotta sent Mr. Cruice a lengthy email in response to his May 19 request. (Jt. Exh. 28). She stated that the Hospital did not believe the requests were relevant and provided Pennsylvania case law interpreting the PRPA that clearly supported the Hospital's assertion that the Joint Commission surveys were confidential and not subject to disclosure. (Jt. Exh. 28).

At bargaining sessions in May, the parties discussed the bargaining request and the confidentiality concerns. (Tr. 40, 360). The Hospital attempted to accommodate the Union's interest in the information. (Tr. 40-41, 361). Andrew Gaffney testified that the Hospital's chief

[10] Clearly, Ms. Bilotta intended to write "union" instead of management.

negotiator, Roger Gilson, "mention[ed] that maybe there is something they could do confidentially [sic] around JCAHO." (Tr. 41). Mr. Gilson and the Hospital researched the peer review privilege issue to determine whether "if anything was disclosed…was the privileged waived" (i.e., could the Hospital provide a portion of the report and protect the confidentiality of the rest). (Tr. 361). Mr. Gilson raised the public policy behind the confidentiality of the surveys because "physicians had participated in the review process on the condition that their comments were going to be confidential" and disclosure of certain statements could be "very, very destructive." (Tr. 360). Mr. Gilson testified that he stated, during a bargaining session, that:

> We wanted to be reasonable in terms of our information request. I said if we couldn't give something, we'd try to find another way to get the information to them. And I pointed out, I guess, an example so as to how we would do that so that we would meet their needs. But I said to them, for example, we were to give them other information about staffing. But pointed out that I would offer to give them other information on staffing, but I said for them, we had already done that. There was not much that we could give that was possible.
>
> (Tr. 362-63).

On May 27, Elizabeth Bilotta sent another lengthy letter to PASNAP in response to the discussions at the table and parties' May 19 and 20 correspondence. (Jt. Exh. 12). She again addressed the Union's assertions that the surveys were not confidential and protected from disclosure. (Jt. Exh. 12). This time, she included relevant NLRB case law as well as the Pennsylvania case law to support the Hospital's position. (Jt. Exh. 12, p. 2-5). She also addressed Mr. Cruice's statements that the Union wanted the surveys because staffing levels were a central issue in negotiations. (Jt. Exh. 12). As Mr. Gilson had, she pointed Mr. Cruice to the information which the Hospital had already provided to the Union regarding staffing, namely a "crate of data on staffing and census by units, core staffing, the Medical Center's method for calculating HPPD, how it calculates staffing 4 different times each day, how low census is

determined relative to staffing levels and budget with many charts and explanations." (Jt. Exh. 12; see also Jt. Exh. 20-27, the voluminous staffing information provided). Ms. Bilotta ended the letter by inviting Mr. Cruice to discuss the issue further. (Jt. Exh. 12, p. 6).

On June 2, Mr. Cruice sent Ms. Bilotta a letter. (Jt. Exh. 29). He stated that "we appreciate your cooperation with respect to the Union's requests of information but we are puzzled as to why you are refusing the Joint Commission report that we requested several weeks ago." (Jt. Exh. 29). He asserted again that he did not "believe the cases you cited in your letter refusing to share this information would be relied upon by the current NLRB to sustain your refusal to provide this information." (Jt. Exh. 29). He did not refer to the information already provided by Crozer that related to staffing and patient care or modify the Union's request beyond the actual Joint Commission report. (Jt. Exh. 29).

In June, Mr. Gilson requested a sidebar with Mr. Cruice to discuss the request further. (Tr. 361). Mr. Gilson was not sure if other union representatives were present at the sidebar. (Tr. 361). Mr. Gilson asked Mr. Cruice: "is there any way you can think of that we can address this, because it seemed like, and I'd use the word binary. It's like you have the [peer review] privilege or you waive the privilege upon disclosing… So I asked if [Mr. Cruice] had an idea how we can resolve this, a brighter idea than I have, I said I'd be open to it." (Tr. 361-362). The Union never modified its position or sought different information other than the privileged non-public information. (Tr. 365, 90-91; Jt. Exh. 6, 8, 10, 29). In fact, Andrew Gaffney testified that the Union was specifically interested only in the survey and not the information on which the survey was based:

> Q. [Mr. Jeffrey]: And isn't it true that the hospital is taking the position that they couldn't provide the joint commission document for the reasons which have been laid out in correspondence which is in evidence? Isn't it true that the hospital took that position, but then gave you a tremendous

amount of data on underlying issues? So when you say the joint commission comes in and looks at things, didn't the hospital give to the union in response to your request a tremendous amount of data about those underlying issues at the hospital?

A. [Mr. Gaffney]: I think there is a distinct difference in our position that the underlying data provided by the hospital isn't done by an independent reviewing body. And I think that that lends more credence, I think, to the overall condition of the hospital and what's being done. The difference is the underlying data. When you're saying, I assume you're saying staffing concerns that we had raised, is that what you're talking about?

Q. [Mr. Jeffrey]: Well, I want to talk to you about some of those things.

A. [Mr. Gaffney]: Okay, but again, our position is that what we were looking for is that this is an independent body that does an independent review and that's going to give us a much clearer view.

(Tr. 93-94).

During bargaining, the Hospital provided the "underlying data" about which Mr. Gilson and Mr. Gaffney testified. (Jt. Exhs. 20-27; Tr. 362-63, 94). This included:

- The Hospital's staffing model for each of the 15 units on which the bargaining unit nurses work (Jt. Exh. 20 Jt. Exh. 19, ¶ 7). The chart shows the budgeting staffing numbers for registered nurses, unlicensed assistive personnel ("UAP"s), and licensed practical nurses for days, evening, and nights on the 15 units. (Jt. Exh. 20);
- The budgeted and actual FTEs for each hospital unit for the past two years (Jt. Exh. 21 Jt. Exh. 19, ¶ 8);
- The Hospital's daily census over the past two years (Jt. Exh. 22, Jt. Exh. 19, ¶ 9);
- Core staffing required by management for each unit in the preceding three years and Hospital census, cancellations, assignment sheets, and nurse scheduling for Thanksgiving and Christmas in the preceding three years. (Jt. Exh. 27, Jt. Exh. 7 ¶ 12a-f) The Hospital's response was 346 pages (Jt. Exh. 27);

- Copies of reports and surveys performed by the Pennsylvania Department of Health related to the quality of patient care at the Hospital (Jt. Exh. 23, Jt. Exh. 7, ¶ 3);
- Communications/complaints by patients or their families to the hospital that deal with quality of care delivered by Registered Nurses. (Jt. Exh. 24, Jt. Exh. 7, ¶ 4). This included a Patient Experience of Care report and an Internal Complaint Log which included three years of data. The 84 pages included every formal complaint/comment to the Hospital including corresponding unit over that period. (Jt. Exh. 24).
- Incident reports of hospital-acquired infections in the preceding three years. (Jt. Exh. 25, Jt. Exh. 7, ¶ 5). This included 12 pages of data detailing the type of any suspected infection and the unit on which the patient was located; (Jt. Exh. 25);
- Incident reports for patient falls in the preceding three years. (Jt. Exh. 26; Jt. Exh. 7, ¶ 6). This included 54 pages of data detailing the incident and the unit on which the patient was located. (Jt. Exh. 26).

1. <u>Credibility Determinations</u>

a) The Facts Regarding the Parties' Bargaining and Exchange of Information about the Joint Commission are Largely Undisputed

The majority of the disputed issues regarding the Joint Commission relate to the law, not the facts or the parties' testimony. While Mr. Gilson testified in more detail about his conversations with the full bargaining team and an additional conversation with Mr. Cruice (who did not testify), Mr. Gaffney and Mr. Gilson's testimonies were not contradictory. In fact, their testimony supports the contemporaneous positions of the parties in their April, May, and June correspondence: the Union was interested in the Joint Commission reports; the Hospital claimed the reports were not relevant and, moreover, were protected by privilege under state law; the

Hospital provided reams of data on staffing and patient care and safety (the Union's claimed reason for wanting the reports); and the Union did not move from its position that it wanted the actual reports and did not believe the reports were privileged.

Mr. Gaffney testified that the Union wanted the actual Joint Commission surveys and not just the "underlying data" provided by the Hospital, because the Commission was "an independent body that does an independent review." (Tr. 94-95). Mr. Gilson testified that the Union did not change its position from asking for the non-public Joint Commission documents. (Tr. 365). Mr. Gaffney testified that the Hospital attempted to accommodate the Union's request and conceded that the Hospital provided numerous different types of staffing information. (Tr. 40-41, 98-100). Mr. Gilson testified that the Hospital made several attempts to discuss the issue of accommodation with the Union and that the Hospital had provided voluminous information on staffing and issues related to patient care (the "underlying data"). (Tr. 361-363). Mr. Gaffney testified that he remembered one discussion of accommodation at a full bargaining session. (Tr. 40-41). Mr. Gilson testified that there were one or two discussions at full bargaining sessions and a further discussion in a sidebar with Mr. Cruice (Mr. Gaffney was not present at this sidebar). (Tr. 363, 365).

The exchange of letters between the parties supports the testimony at the hearing. (Jt. Exhs. 6-10, 29). On April 9, the Union requested "[c]opies of all JCAHO hospital surveys for the past three years." (Jt. Exh. 6). When the Hospital provided a link to the public Joint Commission surveys, the Union requested "actual survey results," including "any non-public documents and correspondence from the Joint Commission." (Jt. Exh. 8). When the Hospital stated that it could not provide the surveys because they were confidential and protected by state law, the Union disagreed with the Hospital's interpretation of the law and merely repeated its

request with its rationale for wanting the information. (Jt. Exh. 10). When the Hospital reiterated in response that the surveys were privileged under state law, that the NLRB recognized that such reports were confidential, and referred to the voluminous underlying staffing data already provided, the Union did not modify its request. (Jt. Exh. 29).

b) Mr. Gilson's Testimony about his Side Bar with Mr. Cruice is Unrebutted and Must be Credited

Mr. Gilson and Mr. Gaffney's testimony regarding what occurred at the table and in correspondence are consistent. Mr. Gilson had an additional conversation with Mr. Cruice in June during which he repeated many of the same issues raised at the table or in the letters. His testimony about what took place was not contradicted by Mr. Gaffney or any other witness. It should be credited.

c) Mr. Gaffney's Testimony Regarding the Relevance of the Joint Commission's Reports Should not be Credited

While Mr. Gaffney was credible with respect to the bargaining and correspondence, his testimony regarding the relevance of the Joint Commission information is in dispute. See Jerry Ryce Builders, 352 NLRB 1262, fn. 2 (2008)("nothing is more common in all kinds of judicial decision than to believe some and not all of a witness' testimony."). Mr. Gaffney was asked if his testimony that the Joint Commission reports might have some relation to staffing was speculative. (Tr. 92). Mr. Gaffney responded with speculation. He testified that he believed the 2013 Joint Commission review had gone poorly and there were deficiencies inside the hospital. (Tr. 92). From there, he testified that "we know that there are things that are not being completed. One of the reasons that the union believes this was not being completed was staffing." (Tr. 92-93). Mr. Gaffney did not identify how the deficiencies related to "things

that are not being completed." (Tr. 93). His testimony as to why the Joint Commission information was relevant was not credible; it was speculative.

To attempt to elevate the important of staffing to the Crozer negotiations, Mr. Gaffney contradicted an earlier sworn affidavit he provided to the NLRB. (Tr. 87-89). When he was asked on cross-examination: "[s]taffing isn't the biggest issue with these negotiations, is it," he responded brusquely: "No, you're wrong." (Tr. 87). When confronted with his own affidavit to the NLRB, Mr. Gaffney had to admit that he swore that "the most significant issues involve proposals by the hospital to cut wages for some employees and to change pension benefits." (Tr. 89-90). He did not mention staffing. (Tr. 89-90). While the Hospital's position about the relevance of the Joint Commission survey has remained unchanged, Mr. Gaffney's testimony suggests that the Union is trying to inflate the importance of staffing to support its theory that the Joint Commission reports are relevant. This cannot be credited.

B. Argument: The Hospital Engaged in Months of Bargaining Regarding the Joint Commission Reports and Did Not Refuse to Bargain with the Union

At its core, this is a very straightforward issue. The union wanted surveys and recommendations issued by the Joint Commission because it speculated that these independent, third-party reports would support their position on staffing. The Hospital provided comprehensive data and documents on staffing, but could not provide the actual Joint Commission reports because they are highly confidential and privileged under state law. Even partial disclosure of the reports would waive the privilege and prevent the Hospital from claiming protected, privileged documents in the future. Despite immediate and thorough explanation regarding the privilege concerns, the Union did not modify its position: it wanted the reports. The parties had multiple discussions about accommodating the Union's request. Each one ended in the same manner: the myriad of underlying staffing data that the employer provided

was, according to the Union, not sufficient. Under the circumstances here, the Hospital has met its obligations under the Act.

1. The Joint Commission Surveys Were Not Relevant or Necessary for the Union's Collective Bargaining Duties

Confidentiality and state law peer review privilege does not matter if the information requested by the Union was not relevant. It was not.

a) The Union's Request was not Presumptively Relevant

Information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. Southern California Gas Co., 344 NLRB 231, 235 (2005).

The Joint Commission is an independent, not-for-profit organization that accredits and certifies health care organizations and programs in the United States. (Jt. Exh. 1, ¶ 33). The Union's request for "the actual survey results delivered to Crozer by the Joint Commission for the last 3 years" is not presumptively relevant. The report created by an independent third-party regarding hospital compliance does not pertain to wages, hours, and working conditions of the represented nurses. See Troy Hill Nursing Home, 326 NLRB 1465 (1998)(finding Medicaid cost reports are not presumptively relevant).

b) Neither the Union Nor the General Counsel Established that the Joint Commission Surveys Were Relevant to the Union's Duties as Collective Bargaining Representative

If the Union requests information that does not pertain to the wages, hours, and working conditions of the represented employees, no presumption of relevance attaches and the union bears the burden of establishing the specific relevance of the information sought. Shoppers Food Warehouse, 315 NLRB 258, 259 (1994). Crozer asserted that it did not believe the Joint Commission surveys were relevant. (Jt. Exh. 9, 12, 28). The Union can satisfy its

burden of establishing relevance "when it demonstrates a reasonable belief, supported by objective evidence, that the requested information is relevant." Disneyland Park, 350 NLRB 1256 (2007), citing Knappton Maritime Corp., 292 NLRB 236, 238-39 (1988). The Union failed to provide objective evidence.

In response to the Hospital's assertion that the information was not relevant, the Union claimed that: "[a]mong the many reasons why this data is relevant, Joint Commission surveys help pinpoint gaps in patient care and establish the foundation for the Union's proposals to improve staffing levels." (Jt. Exh. 10). The Union offered no reasonable basis to establish that the Joint Commission's findings and recommendations have anything to do with nursing staffing levels or any other issue related to their duties as collective bargaining representative. While the Board uses a liberal discovery-type standard, the showing by the union "must be more than a mere concoction of some general theory which explains how the information would be useful to the union…Otherwise, the Union would have unlimited access to any and all data which the employer had." Southern Nevada Builders Assn., 274 NLRB 350, 351 (1985). Speculation does not establish relevance. Southern California Gas Co., 344 NLRB 231, 235 (2005); see also U.S. Postal Service, 352 NLRB 1032, 1036 (finding the "Union's 'generalized conclusory explanation of relevance is insufficient to trigger an obligation to supply information that is on its face not presumptively relevant'"), citing Disneyland, 350 NLRB at fn. 14. The Hospital provided the Union a public letter from the Joint Commission that confirmed the purpose of the Joint Commission's survey was "assessing compliance with the Medicare conditions for hospitals." (Jt. Exh. 31).

(1) Reliance on *Olean General Hospital* to Show Relevance of Joint Commission Surveys is Misplaced

The Board has not considered the relevance of Joint Commission surveys, but an administrative law judge has considered whether a request for surveys was relevant. Olean (NY) General Hospital, JD-68-13, 3-CA-097918 (September 24, 2013). While ALJ Amchan's decision is not binding in this matter, the facts surrounding the request in that case are distinguishable. In Olean, the Hospital received deficiencies by the Joint Commission on March 1 and, within a week, the Hospital's President and CEO informed nursing staff of the deficiencies and stated "there would be zero tolerance for failure to take corrective action" based on the 43 deficiencies. Id. at slip. op. 4. The Union requested the Joint Commission report and a list of the deficiencies on March 4. Id. In Olean, both parties testified that "staffing has been a major issue in contract negotiations" and the judge relied on that fact to find that the deficiencies noted in the Joint Commission were relevant because they may be related to staffing issues. Id. The judge did not provide any additional explanation for his conclusion.

Here, the only testimony about the importance of staffing in the negotiations was by Mr. Gaffney and it was contradicted by his earlier sworn statement. (Tr. 87-89). In his affidavit to the NLRB, Mr. Gaffney did not mention staffing as one of the major issues in these negotiations. (Tr. 89). The Union's attempt here to mirror the facts in Olean in order to establish the relevance of the request should not be not credited. Further, the request for the Joint Commission information in Olean was contemporaneous to hospital management threatening nurses and administrators if corrective action was not taken.[11]

[11] Likewise, while controlling Board law, Borgess Medical Center, 342 NLRB 1105, 1105 (2004) is distinguishable as it relates to the relevance of the peer review documents. There, the Board found that incident reports privileged under peer review law were relevant for the union to represent an employee at an arbitration. A nurse was terminated for a medication error and the Union, in preparing for her arbitration, requested incident reports concerning other medication errors to find comparators. Id. While the Employer ultimately demonstrated that the

The Union has not met its burden to show that the Joint Commission report and initial deficiencies were related to staffing and therefore failed to establish their relevance. The speculation that the Joint Commission surveys somehow related to staffing does not on its own create relevance. See Southern California Gas Co., 344 NLRB at 232 ("mere mention of the word 'safety'" in a request for information is not sufficient to establish relevance).

2. Assuming *Arguendo* that the Joint Commission Surveys are Relevant, Crozer Demonstrated a Legitimate and Substantial Confidentiality Interest in the Joint Commission Surveys

The duty to supply information under Section 8(a)(5) turns upon the circumstances of the particular case and much the same may be said for the type of disclosure that will satisfy that duty. U.S. Postal Service, 359 NLRB No. 115, slip. op. 3 (May 2, 2013), citing Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979). If a party asserts that requested information is confidential, the Board balances the union's need for relevant information against the legitimate and substantial confidentiality interests established by the employer. Piedmont Gardens, 359 NLRB No. 46, slip. op. at 2 (2012), citing Detroit Edison, 440 U.S. at 318-320.

a) The Hospital Timely Raised its Legitimate Confidentiality Concerns

The Hospital asserted at the table and through detailed correspondence that, even if the Joint Commission reports were relevant (the Hospital maintained they were not), the reports were confidential. (Jt. Exh. 9, 12, 28; Tr. 40, 360). The Hospital did so immediately upon discovering that the union was requesting the actual, non-public surveys. (See Jt. Exh. 9). See Mission Foods, 345 NLRB 788 (2005)("confidentiality claim must be timely raised before balancing test is triggered"). Crozer's immediate claim of confidentiality, therefore, contrasts with the employer in Washington Hospital Center Corporation, 360 NLRB No. 103 (2014).

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reports were protected by state peer review privilege law, the Union met its initial burden of showing relevance under those specific circumstances.

There, the hospital cited peer review privilege as its reason for failing to disclose a staffing matrix for the first time in its post-trial brief to the Board. Here, Crozer raised it immediately.

b) Pennsylvania Statutory and Case Law Establishes that Joint Commission Records are Confidential and Privileged and Not Subject to Disclosure

The NLRB recognizes that state law deeming certain information confidential may be considered in assessing whether there is a legitimate confidentiality interest in that information. GTE California Inc., 324 NLRB 424, 427 fn. 10 (1997); see also Borgess Medical Center, 342 NLRB 1105, 1105 (2004). Pennsylvania's Peer Review Protection Act ("PRPA") provides that:

> The proceedings and records of a review committee shall be held in confidence and shall not be subject to discovery or introduction into evidence in any civil action against a professional health care provider arising out of the matters which are the subject of evaluation and review by such committee and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such committee or as to any findings, recommendations, evaluations, opinions or other actions of such committee or any members thereof. Provided, however, that information, documents or records otherwise available from original sources are not to be construed as immune from discovery or use in any such civil action merely because they were presented during proceedings of such committee, nor should any person who testifies before such committee or who is a member of such committee be prevented from testifying as to matters within his knowledge, but the said witness cannot be asked about his testimony before such a committee or opinions formed by him as a result of said committee hearings.

63 P.S. § 425.4; see also Jt. Exh. 5

Pennsylvania courts have found that Joint Commission "is a review committee for purposes of Section 4 of the Peer Review Protection Act." O'Neill v. McKeesport Hospital, 48 Pa. D. & C.3d 115, 119-120 (Pa.Com.Pl. 1987)(denying motion to compel Joint Commission reports because they were protected by the PRPA); see also Rosser v. Feldman, 38 Pa. D. & C.4th

353, 355 (Pa.Com.Pl. 1998)(finding that the Joint Commission "is a review organization as intended by the Act [PRPA]"). As such, "any findings, recommendation, evaluation, or opinions of the JCAH generated by health care providers on behalf of JCAH, with respect to any review of the practice and procedures governing treatment…are records of a review committee." O'Neill, 48 Pa. D. & C.3d at 120. In O'Neill, the court made specific reference to the strong policy considerations favoring confidentiality:

> The purpose of peer review is to improve the quality of care provided by health care providers through reviews by other health care providers of care and treatment previously rendered. Effective peer review requires the reviewing physicians to make a comprehensive and honest evaluation. Such an evaluation may contain findings and recommendations that are extremely critical of another health care provider. If these evaluations may be used against that health care provider in medical malpractice actions, it is far less likely (1) that physicians or hospitals will seek peer review or (2) that physicians engaging in peer review will make a comprehensive and honest evaluation when the evaluation would be critical of another health care provider. Thus, the legislature has chosen to protect the findings, recommendations, evaluations, or opinions generated through peer review in order to encourage peer review. Id. at 121-22.

Consistent with O'Neill, courts throughout Pennsylvania have held that the PRPA protects the findings of peer review committees from disclosure. See Young v. The Western Pennsylvania Hospital and Richard Liposky, D.M.D., 722 A.2d 153, 156 (1998)("the need for confidentiality in the peer review process stems from the need for comprehensive, honest, and sometimes critical evaluations of medical providers by their peers in the profession"); see also Sanderson v. Bryan, M.D., Ltd.,522 A.2d 1138 (1987)(finding that peer review records are not subject to discovery in any civil action); Walmsley v. Pa. Hospital, 32 Phila. 573, 574 (1996)(denying motion to compel "any documents which are or were the product of peer review").

c) Controlling Board Law Establishes that Hospitals Have a Legitimate and Substantial Confidentiality Interest in Peer Review Documents Protected by State Law

The NLRB has held that a hospital may rely on state peer review law to establish a legitimate confidentiality interest in documents protected by peer review privilege. Borgess Medical Center, 342 NLRB at 1105. In Borgess, a hospital claimed that incident reports were confidential and protected from disclosure by Michigan's Peer Review Statute. Id. As in Pennsylvania, Michigan courts had "recognized the importance of the 'assurance of confidentiality' provided by state law in fostering candid self-assessment by health care facilities to improve patient care." Id., citing Dorris v. Detroit Osteopathic Hospital, 594 N.W.2d 455, 462-464 (Mich. 1999). Michigan's Peer Review Statute provides that:

> The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or institution of higher education in this state that has colleges of osteopathic and human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

MCLA 333.20175(8), MCLA 333.21515; see also Borgess, 342 NLRB at 1105 fn. 4.

Citing the peer review statute and Michigan public policy, the Board held that Borgess had "established a legitimate confidentiality interest in the incident reports." Id. at 1106. Borgess cannot be meaningfully distinguished from the case at bar. The Pennsylvania and Michigan peer review statutes are very similar and, like the union in Borgess, PASNAP requested peer review reports. (Jt. Exh. 6, 8, 10). Like Michigan's statute, the PRPA does not contain a provision requiring disclosure unless otherwise required by law. Therefore, the Hospital met its burden to establish that they were confidential.

d) *Olean General Hospital* is not Controlling Law and is Distinguishable

To the extent the Charging Party and counsel for the General Counsel cite Olean General Hospital for the proposition that the PRPA does not protect the Joint Commission documents from disclosure to the Union, their argument is misguided for several reasons. In Olean, an Administrative Law Judge found the failure to provide Joint Commission materials upon request by a union was unlawful because the New York Education Law statute covering disclosure of such materials prevented disclosure "except…as provided by another provision of law." Olean General Hospital, JD-68-13 at slip. op. 5. Because there was an exception and because Section 8(a)(5) required disclosure, the ALJ found reliance on that statute improper. Id. The ALJ distinguished Borgess Medical Center because the Michigan statute relied upon by the Board there had no such exception. Id. at slip. op. 6. Here, as in Michigan, the PRPA does not contain a similar exception.

The ALJ in Olean found that the NY statute did not apply because it protected disclosure in a court proceeding, but was silent on the National Labor Relations Act. Id. at slip. op. 5. The Michigan statute also only protected disclosure "subject to court subpoena" and was silent on the Act, but the Board in Borgess rightly applied it to disclosure pursuant to Section 8(a)(5). The PRPA contains similar language to the Michigan statute protecting disclosure in "discovery or introduction into evidence in any civil action."

Finally, the Hospital in Olean did not raise the confidentiality issue until it answered the Consolidated Complaint in that matter. Id. at fn. 1. Here, Crozer raised its legitimate confidentiality concerns immediately and in great detail.

e) The Exception in the PRPA Permitting Disclosure of "Original Sources" Does Not Allow for Disclosure of the Joint Commission Surveys

The PRPA does not protect "information, documents or records otherwise available from original sources." However, the Union specifically and repeatedly asked for the actual survey results, which are protected. Mr. Gaffney recognized that the Hospital had provided underlying data on staffing, but the Union wanted to see the independent review created by the Joint Commission. (Tr. 362-63). When asked why the underlying data was insufficient for the Union's purposes, Mr. Gaffney testified:

> [T]here is a distinct difference in our position that the underlying data provided by the hospital isn't done by an independent reviewing body. And I think that that lends more credence, I think, to the overall condition of the hospital and what's being done. The difference is the underlying data….our position is that what we were looking for is that this is an independent body that does an independent review and that's going to give us a much clearer view. (Tr. 94).

Original source documents generally have been defined as those documents not created solely for peer review. Hanzseck v. McDonogh, 44 Pa. D. & C.3d 639, 644 (Pa.Com.Pl. 1987). The Hospital provided years of staffing and patient care data and statistics. The Union was not just looking for this information. It wanted the reports. This is precisely the information that the PRPA protects from disclosure and the actual third party surveys do not fit within the statute's sole exception.

3. Crozer Attempted to Accommodate the Union's Interest in the Joint Commission Surveys

The NLRB "balance[s] a union's request for information against any 'legitimate and substantial' confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information." Allen Storage and Moving Company, Inc., 342 NLRB 501, 502 (2004), citing

Minnesota Mining & Mfg. Co., 261 NLRB 27, 30 (1982), enfd. sub nom. Oil Chemical & Atomic Workers Local 6418, v. NLRB, 711 F.2d 348 (D.C. Cir. 1983). See also Good Life Beverage Co., 312 NLRB 1060, 1061 (1993)(the "accommodation appropriate in each individual case would necessarily depend upon its particular circumstances").

At bargaining sessions in May and during a sidebar in June, the parties discussed the confidentiality concerns. (Tr. 40, 360). The Hospital researched whether a portion of the surveys could be disclosed and the privileged protected. (Tr. 361).

a) The Hospital Could Not Produce a Portion of the Privileged Documents without Waiving the Privilege

Under Pennsylvania law, a "privilege may be waived if a party to the confidential information disclosed the information to a third party." Rosser, 38 Pa. D. & C.4th at 355 (Pa. Pa.Com.Pl. 1987) citing Sprague v. Walter, 656 A.2d 890 (1995). In Rosser, the Court concluded that "[w]ithout such [third-party] disclosure, any privilege provided by the Peer Review Protection Act remains unaffected and intact." Id. (citations omitted); see also Byrns v. Urology Associated of the Poconos, Inc., 19 Pa. D. & C.5th 557, 568 (Pa.Com.Pl. 2010)(finding that, although a "privilege may be waived if a party to the confidential information disclosed the information to a third party," the Defendant could assert privilege under the PRPA and protect requested documents from discovery because it had not disclosed the factual findings in the Peer Review Process to a third party).

Crozer concluded, and informed the Union, that it could not partially disclose the Joint Commission surveys because it would "effectively waive the peer review protection for the institution." (Jt. Exh. 12, p. 4). Mr. Gilson explained the waiver issue to Mr. Cruice at a sidebar, when he stated: "I'd use the word binary. It's like you have the privilege or you waive the privilege upon disclosing." (Tr. 361-62).

b) The Union never Agreed that the Reports were Confidential and Insisted on Full Disclosure

Despite providing the Union with a detailed explanation by letter as to why the surveys were confidential and protected under state law and that disclosing the surveys would waive the privilege, the Union never accepted that they were confidential and continued to insist upon the actual surveys. (Jt. Exh. 8, 10, 29; Tr. 94). Mr. Gilson and the Hospital reminded the Union that it had provided years of staffing, incident reports, and census information by unit. (Jt. Exh. 12; Tr. 362-63). The Union never changed its position on the information it sought. (Tr. 94, Tr. 365; Jt. Exh. 8, 10, 29). In May, it requested "the actual survey results delivered to Crozer by the Joint Commission…this includes any non-public documents and correspondence from the Joint Commission and any recommendation of deficiencies." (Jt. Exh. 8). Later that month, the Union simply reiterated its request for surveys, only adding the claimed relevance for the request. (Jt. Exh. 8). In June, the Union disagreed with the Hospital's position and requested the report(s) again. (Jt. Exh. 29).

c) Board Law Recognizes that an Employer does not have to Waive Privilege by Disclosing Confidential Documents to Accommodate a Request for Information

Regardless of the type of confidential information, the Board balances the relevance of the request with the legitimate and substantial nature of the confidentiality. Piedmont Gardens, 359 NLRB at slip. op. at 2, citing Detroit Edison, 440 U.S. at 318-320. In cases involving privilege issues, the Board has found an employer has met its obligation to bargain when it has provided or offered to provide the underlying data as opposed to a privileged report. See BP Exploration, 337 NLRB 887 (2002).

In BP Exploration, the employer's facility received an unannounced state OSHA inspection. The inspector advised that there would likely be citations and the employer, through

counsel, contracted with an engineering consulting group to conduct an attorney-client privileged investigation. Id. at 887-888. The consulting group prepared a privileged report to the employer of anticipated OHSA issues and potential responses. Id. After OSHA issued citations, the union requested the privileged report prepared by the consultants so that it could weigh in on potential changes that the employer would need to make. Id. at 888. The employer refused to provide the report to the union because it was attorney-client privileged. Id. at 888. The employer offered to provide certain information contained in the reports, but the union sought "the reports—not the factual information contained in them." Id. at 889. The union "insisted on the reports themselves—and nothing less." Id. The Board held that, "given the Union's insistence in disclosure of the reports, the Respondent discharged its obligations under the Act by offering to provide the Union with certain information contained in the reports, an accommodation the Union categorically rejected." Id. at 887.

Administrative Law Judge Kennedy, whose opinion was adopted in BP Exploration, recognized that analyzing the accommodation of a request for privileged documents was different than analyzing the accommodation of a request for other confidential information:

> Negotiating over attorney-client/attorney work product is not realistic. In the final analysis, such an aim is probably unworkable. Attempting to equate the attorney privileges with confidential matters such as trade secrets, medical records, informant names, and the like is simply not feasible. There is room for maneuvering with respect to such matters. There is no such room when it comes to communications between lawyer and client. Bargaining is not an option if the client wishes the communications to remain within the privilege.
>
> Id. at 890 (citations omitted)
>
> The Board agreed with this analysis in its holding:
>
> Under the circumstances, then, the Respondent has no obligation to bargain with the Union over an accommodation that would have entailed disclosure of the actual [privileged] reports…In the context of this case,

> what matters is that the reports were subject to the privilege, that the prospect of disclosing the reports raised a substantial concern that the privilege would thereby be waived, and that the Union failed to demonstrate its need for the reports themselves, as opposed to the factual information contained in the reports.
>
> Id. at 887.

Here, Crozer could not disclose any portion of the surveys (other than the public surveys) and preserve the privilege under the PRPA. As in BP Exploration, PASNAP, without compromise, repeatedly insisted on the actual reports and was not interested in the "underlying data" provided-- hundreds of pages of reports on staffing and patient care/safety, the claimed reason that PASNAP wanted the reports. (Jt. Exh. 10, 20-27). When Crozer raised that it had provided this information, the Union, without modifying its request, continued to request the reports.

By comparison, the union's need for privileged documents in Borgess was much more compelling than PASNAP's here. In Borgess, the requested documents would show comparator data relevant for an arbitration. Despite this narrow request, the Board held that the Hospital's legitimate and substantial confidentiality concerns outweighed the Union's need for the reports themselves. Borgess Hospital only ran afoul of Section 8(a)(5) when it refused to provide underlying factual information not protected by privilege. Here, unlike the employer in Borgess, Crozer provided the union with hundreds of pages of staffing and patient care/safety information. Despite this, the union still wanted the reports.

The NLRB has long held that it will "accommodate the parties' respective interests insofar as feasible in determining the employer's duty to supply [requested, but confidential] information." Minnesota Mining & Mfg. Co., 261 NLRB 27, 30 (1982), enfd. sub nom. Oil Chemical & Atomic Workers Local 6418, v. NLRB, 711 F.2d 348 (D.C. Cir. 1983). It

was not feasible here to accommodate the parties' respective interests. PASNAP insisted on Crozer producing a privileged report which was protected by state law from disclosure. Crozer could not disclose any part of the report without waiving the peer review privilege. Crozer bargained in good faith and did not violate the Act by failing to provide the reports and recommendations created by the Joint Commission during its most recent survey.

VIII. Allegation #7: Respondent did not Refuse to Bargain regarding the Union's Request for Information Related to the Staffing Agency Contract

A. Statement of Facts

On September 8, 2014, PASNAP hand delivered a notice pursuant to Section 8(g) of the Act that its members would engage in a two day strike on September 21 and 22. (GC Exh. 2). Nurses did strike on those two days. (Tr. 44). On September 12, having received the 8(g) notice, Elizabeth Bilotta emailed the bargaining unit to inform them of their right to work during the strike if they wished and that Crozer had secured temporary replacement nurses to cover positions vacated by strikers. (Jt. Exh. 13). The email also stated: "[w]hile the Union's strike notice promises only a two-day strike, the staffing company's insistence on a five day work guarantee may mean that many positions will not be available until after five days have passed since the beginning of the strike." (Jt. Exh. 13).

On September 12, after receiving Ms. Bilotta's email, Mr. Cruice requested information to verify Ms. Bilotta's assertion that "Crozer had to give (the staffing agency) a guarantee of five days' work in order to secure a guaranteed staffing commitment from them." (Jt. Exh. 14). He requested a copy of the staffing agency contract, documents related to the negotiation of that contract, and copies of contracts that the hospital or health system had entered into within the last three (3) years with any temporary employment agency or nurse registry for the provision of nursing care at the hospital. (Jt. Exh. 14).

Mr. Gilson responded to the union's request for information at a bargaining session by stating that the request "was going to be problematic because the contract is confidential." (Tr. 354-55). Mr. Gilson requested that U.S. Nursing, the staffing agency, permit disclosure of the contract; they refused. (Tr. 355-56, Jt. Exh. 1, ¶ 36). On September 23, Mr. Gilson informed Mr. Cruice that U.S. Nursing "has not given permission to disclose that [the contract]." (Jt. Exh. 1, ¶ 35). Mr. Gilson then went back to U.S. Nursing to explain that the union "wanted to test the proposition whether…there was a guarantee [of five days]." (Tr. 356; Jt. Exh. 16(a); Jt. Exh. 1, ¶ 36). Ultimately, U.S. Nursing agreed to disclose the relevant portion of the contract and sent Mr. Gilson a heavily redacted version which showed the five-day staffing guarantee and the contract's confidentiality clause. (Tr. 356; Jt. Exh. 16(a),(b)). Mr. Gilson sent a letter to the Union on October 16 with the redacted contract containing the relevant portions of the contract. (Jt. Exh. 16(b)). It was U.S. Nursing's standard form contract. (Tr. 359). The non-redacted portions showed that the contract did require a five-day guarantee and contained a confidentiality provision. Section 4(b) of the Contract states that:

> i) A "Shift" shall be considered one continuous twelve (12) hour day unless FACILITY and US Nursing agree otherwise.
> ii) FACILITY shall schedule sufficient "Shifts" each Workweek (as defined below) so that all Staff deployed to FACILITY shall be guaranteed a minimum of five Shifts in the first Workweek and four Shifts per Workweek thereafter.
>
> Section 6 of the Contract states that:
>
> Confidentiality and Exclusivity. FACILITY and US Nursing will maintain the confidentiality and exclusivity of this Staffing Agreement. Each party agrees not to disclose the contents, or provide copies, of this Staffing Agreement to any other person or organization without the express written permission of the other party, except to the extent required by law. Should this document be subject to a subpoena or request for production in any proceeding, the disclosing party agrees to promptly notify the other party so that it may seek a protective order prohibiting or restricting the terms of such production.

In the letter accompanying the contract, Mr. Gilson explained, again, that U.S. Nursing had "impos[ed] on the Medical Center a five day staffing commitment." (Jt. Exh. 16(a)). Mr. Gaffney testified that the Mr. Gilson had previously told the Union at the table that U.S. Nursing insisted on the five-day commitment. (Tr. 80, 84). Mr. Gilson ended the letter by asking Mr. Cruice to contact him or Liz Bilotta if he had any questions. (Jt. Exh. 16(a). Once the Union received the contract, the Parties did not have any further discussion about the U.S. Nursing request. (Tr. 359).

On December 19, Mr. Cruice sent Ms. Bilotta a letter an information request in which, among other things, he repeated his request for "the usage of temporary nurse staffing agencies." (GC Exh. 3). The Hospital was not aware of this request until December 29, after the holiday season. (GC Exh. 4). Ms. Bilotta responded, by letter, on January 23. (GC Exh. 4). She stated:

> As with the U.S. Nursing contract, the Medical Center's contracts with the other supplemental staffing agencies also contain confidentiality clauses prohibiting the Hospital from disclosing certain confidential business information. Notwithstanding this, we are contacting the three (Medstaff and Cross Country Staffing have merged) agencies to request permission to disclose these contracts. I have attached copies of the letter for your information. In light of the confidentiality provisions, each is entitled to say no. However, we will again use our best effort to persuade them to release the information. If you would like [to] discuss this further or engage in negotiations over this issue, please let us know. (GC Exh. 4).

Ms. Bilotta sent letters to the staffing agencies requesting that they "give your written consent to our disclosure of the document to the union. Please let us know whether and if so on what conditions, if any, you would be willing to grant your consent. If you have any questions concerning this matter, please call me directly." (GC Exh. 4). Ms. Bilotta also sent a letter to U.S. Nursing. (GC Exh. 4). While U.S. Nursing agreed to release a redacted version of

the contract and Mr. Gilson did provide that version to the Union on October 16, in light of the December 19 information request, Ms. Bilotta asked again if they would consent to disclosure of their contract with the Hospital. Ms. Bilotta provided a copy of these letters to the Union. (GC Exh. 4).

1. Credibility Determinations

Mr. Gilson's testimony and letters regarding the U.S. Nursing contract are unrebutted. He testified that U.S. Nursing sent its form contract to Crozer and that the contract required a five day guarantee. (Tr. 356, 359). The language of the contract (i.e., using "FACILITY" in block letters throughout) is consistent with it being a form contract. He testified that he contacted U.S. Nursing in September after receiving the request and it took several overtures for U.S. Nursing to agree to any disclosure. (Tr. 356). He also testified, consistent with his correspondence to Mr. Cruice and statements to Mr. Cruice at the table, that U.S. Nursing rejected the Hospital's initial request to disclose the contract and, ultimately, sent Mr. Gilson a redacted version of the contract which they would permit the Hospital to disclose. (Tr. 356, 359). Finally, he kept the Union apprised of the fact that the Hospital had reached out to U.S. Nursing to seek permission to disclose the contract and had not received it yet. (Jt. Exh. 1, ¶ 35).

The facts regarding the exchange of information are not in dispute, with one exception. Mr. Gaffney testified that he has worked for PASNAP for five years and that he has been involved in other strikes. (Tr. 29, 79). Yet, he testified that he was unaware of U.S. Nursing's standard contract demands a five-day commitment in order to cover for a nurses' strike. (Tr. 79, 359). It is not believable that a staff representative at the largest nurses' union in Pennsylvania would be unaware of this industry standard.

Finally, it is significant that neither Mr. Gaffney nor Mr. Gilson testified that the Union raised any claim of relevance regarding the U.S. Nursing or related materials other than Mr. Cruice's statement in the September 12 letter. Mr. Gaffney testified that the Union wanted other staffing contracts and the correspondence related to the U.S. Nursing contract so it could evaluate whether the Union should file a grievance for a violation of the contract's non-discrimination article. (Tr. 47-49). The Union never raised this proffered rationale during bargaining.

B. Argument: The Hospital Provided the Relevant, Non-Confidential Information Requested by the Union related to the U.S. Nursing Staffing Contract

1. The Information Requested by the Union was not Presumptively Relevant

Information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. Southern California Gas Co., 344 NLRB 231, 235 (2005). The union's request for information related to U.S. Nursing and the staffing agencies employing non-unit employees is clearly not presumptively relevant as it relates solely to non-union employees. A request for information relating to employees outside the bargaining unit is not considered presumptively relevant and places a burden on the union to demonstrate the relevance of the requested information. See U.S. Testing Co., 324 NLRB 854 (1997).

2. The Union Only Established that a Portion of One of its Requests Relating to Staffing Agencies was Relevant

The Board has held that employers have no obligation to bargain with a union regarding their staffing contracts or provisions with an outside agency during a strike. Encino-

Tarzana Reg'l Medcial Center, 332 NLRB 914, 918 (2000). In order to demonstrate relevance, therefore, PASNAP stated the following:

> You say in your letter that "Crozer had to give (the staffing agency) a guarantee of five days' work in order to secure a guaranteed staffing commitment from them." If this is in fact the case, the Union requests the following information, in part to verify such an assertion.
>
> (Jt Exh. 14).

3. The Hospital Timely Raised Legitimate and Substantial Confidentiality Concerns, but Provided the Relevant Information Requested

Both Mr. Gilson and Mr. Gaffney testified that the Hospital raised the issue of confidentiality regarding the U.S. Nursing contract at the table. (Tr. 80, 84, 354-55). After the September 23 negotiations, Mr. Gilson again requested permission from U.S. Nursing to disclose the contract to PASNAP. (Jt. Exh. 1, ¶ 36). U.S. Nursing ultimately agreed to disclose the portion of the contract that would demonstrate the confidentiality of the contract and provide the section proving the existence of the five-day guarantee. (Jt. Exh. 16(b)). Since the Hospital had no obligation to bargain regarding the staffing contract and the Union's stated reason for the relevance of the information requested was to confirm the shift guarantee, the Hospital met its obligation under the Act when it provided the information necessary for the Union's purpose. See U.S. Postal Service, 352 NLRB 1032, 1036-37 (2008)(no violation when Employer refused to provide non-redacted version of confidential information that was not presumptively relevant, but possibly relevant based on Union's proffered reason for requesting the information).

4. The General Counsel Did Not Meet its Burden to Show that the Second and Third Requests Related to Staffing were Relevant

Where requested information is not presumptively relevant, as not pertaining to employees in the bargaining unit, "the General Counsel must present evidence either (1) that the

union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the respondent under the circumstances. Absent such a showing, the employer is not obligated to provide the requested information." Id. at 1036, citing Disneyland Park, 350 NLRB at 1256. Neither the Union nor the General Counsel met its burden.

a) The Union did not Demonstrate the Relevance of Its Second or Third Request Related to Staffing

Mr. Cruice's letter on September 12 is the only statement proffered by the Union regarding the relevance of the information related to non-unit employees. Mr. Gaffney did not testify that the Union provided any other rationale for claiming relevance. Mr. Gaffney's post-hoc rationale is irrelevant to whether the Union demonstrated the relevance of the non-unit information at the time.

As with the Joint Commission information, Mr. Gaffney's testimony appears to be an attempt to analogize PASNAP's request with one made by another nurses' union. In Petaluma Valley Hospital, JD(SF)-15-13, 20-CA-88742, ALJ Etchingham considered whether a Hospital's refusal to provide any response to a similar request during a nurses' strike was lawful. That case is distinguishable on several grounds. First, the hospital never provided any portion of the staffing contract to the union; it simply claimed blanket confidentiality without providing any accommodation or any relevant portion of the request. Id. at slip. op. at 4. Here, Crozer specifically and timely raised the confidentiality issue yet still provided the Union with relevant information. Second, with respect to the relevance of correspondence related to the replacement nurse contract and other staffing contracts, the union in Petaluma raised the possibility of filing a grievance as one of the stated grounds for relevance. Id. Here, PASNAP raised this issue for the first time at the hearing. It cannot be evidence that the Union satisfied its burden to

demonstrate the relevance of its request. Therefore, the Union's "generalized conclusory explanation of relevance is 'insufficient to trigger an obligation to supply information that is on its face not presumptively relevant.'" Disneyland Park, 350 NLRB at fn 14.

b) The General Counsel Did not Establish that the Relevance of the Second and Third Requests Should have been Apparent to the Hospital under the Circumstances

Since the Union did not provide an explanation for the relevance of non-unit information, the General Counsel must show that the relevance was apparent to the Hospital under the circumstances. The Union was interested in confirming the presence of a five-day guarantee within the Hospital's contract for strike replacements. Since the Hospital has no obligation to bargain with the union over the strike replacement contract, it is not readily apparent why the negotiation of that contract is relevant to the union's duties. Likewise, it is not apparent why other staffing contracts for non-unit positions are relevant. Prior to the hearing in this case, the union never raised the possibility of filing a grievance under the non-discrimination section of the collective bargaining agreement as a reason for the request.

The ALJ in Petaluma found that the correspondence between the Hospital and the staffing agency was relevant because "obtaining this information would allow the Union to verify whether the 5-day replacement period was required in order to engage the services of the temporary staffing agency…and would reveal whether the 5-day replacement period was a condition for the Respondent to enter into the staffing contract." Petulama, JD(SF)-15-13 at slip. op. at 6. He did not expand further upon this finding, nor did he cite Board law for the proposition that the negotiation of contracts with agencies representing third parties is relevant for purposes of collective bargaining. Further, in Petaluma, there was follow-up correspondence related to the relevance of the request. Id. at slip. op. 3-4. Here, once the requests are not

presumptively relevant and there was no explanation as to relevance, the General Counsel must show that the Hospital should have been aware of the relevance behind request. He did not meet that burden.

5. Assuming *Arguendo* that the Second and Third Requests were Relevant, the Hospital Fulfilled its Obligations under the Act

Mr. Gaffney and Mr. Gilson each testified that the Hospital informed the Union during bargaining that U.S. Nursing insisted upon the 5-day requirement. (Tr. 80, 84, 356, Jt. Exh. 16(a)). This is consistent with Ms. Bilotta's initial email to bargaining unit staff regarding the strike replacements. (Jt. Exh. 13). After the Hospital provided the redacted contract and explanation regarding its formation, the Union never requested any additional correspondence or the non-relevant portions of the contract.

On December 19, the Union, through a letter by Mr. Cruice, reiterated its request for the contracts with other staffing agencies, but- for the first time- provided its rationale for wanting these requests. (GC Exh. 2). The letter states that "the current contract prohibits discrimination for union activity and the information requested on September 12 would enable us to properly enforce such provision through grievances or at the bargaining table." (GC Exh. 2). Thereafter, on January 23, ten days before the start of the Hearing, Crozer requested permission from the agencies to disclose portions of its contracts. (GC Exh. 4). These contracts contained confidentiality provisions prohibiting disclosure. (GC Exh. 4). Crozer copied the Union on these communications to the third-parties. See Pittston Coal Group, Inc., 334 NLRB 690, 692-93 (2001)(Employer must show that they attempted to obtain information from third parties and were refused); see also International Protective Services, Inc., 339 NLRB 701, 703 (2003)(no violation where employer makes good-faith effort to persuade third party to disclose information).

Here, Crozer immediately provided documents responsive to one information request and responded verbally to another. The Union did not raise an issue with the Employer's response or the lack of documentation regarding other staffing contracts until December. In cases where an employer has provided a portion of an information request and the Union did not raise that it sought additional information or request an additional response, the Board has found no violation of the Act. See Page Litho, Inc., 311 NLRB 881, 882 fn. 7 (1993)(no violation where employer provided some information to a November information request in December and union did not request additional information until May)[12]; see also LTD Ceramics, 341 NLRB 86, 87-88 (2004)(no failure to provide information when employer provided "much of the information" requested and Union did not raise the additional information in follow-up letters or subsequent bargaining sessions).

[12] The Board did find a violation related to the Employer's failure to provide information after the second request in May. Id. at 882. However, here, the Employer was trying to get the information to provide PASNAP once the union made its follow-up request in which it explained the relevance of the information. (GC Exh. 4). This was pending as the parties went to Hearing,

IX. CONCLUSION

For all the foregoing reasons, the Respondent submits that the General Counsel has not met his burden, that the Respondent has not violated the Act as alleged, and the Consolidated Complaint should be dismissed in its entirety.

Dated: May 1, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, I caused the foregoing Employer's Brief to the Hearing Officer to be filed with the Hearing Officer using the NLRB E-Filing system. I further certify that I caused a copy to be served via electronic mail upon the following:

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